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No. 83-1020-CFX
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Docketed:
December 19, 1983

Title: Ohio, Petitioner
v.
William Lee Kovacs, dba B & K Enterprises, et al.

Court: United States Court of Appeals
for the Sixth Circuit

Counsel for petitioners: Muchnicki, E. Dennis

Counsel for respondent: Caldwell, David A.

Entry	Date	Note	Proceedings and Orders
1	Dec 19 1983	G	Petition for writ of certiorari filed.
2	Dec 19 1983		Appendix of petitioner Ohio filed.
3	Jan 19 1984		Brief amicus curiae of Pennsylvania filed.
4	Jan 19 1984		Brief amicus curiae of United States filed.
5	Jan 20 1984		Brief of respondents William Lee Kovacs, et al. in opposition filed.
6	Jan 25 1984		DISTRIBUTED. February 17, 1984
7	Feb 14 1984		Reply brief of petitioner Ohio filed.
9	Feb 15 1984		REDISTRIBUTED. March 2, 1984
11	Mar 5 1984		Petition GRANTED. Justice Marshall DLT.
12	Apr 23 1984		Joint appendix filed.
14	Apr 16 1984		Order extending time to file brief of petitioner on the merits until May 21, 1984.
15	May 15 1984		Brief amicus curiae of United States filed.
16	May 18 1984	G	Motion of Council of State Governments, et al. for leave to file a brief as amici curiae filed.
17	May 21 1984		Brief amicus curiae of Commonwealth of Pennsylvania, et al. filed.
18	May 23 1984	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
19	May 23 1984		Brief of petitioner Ohio filed.
20	Jun 4 1984		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
21	Jun 4 1984		Motion of Council of State Governments, et al. for leave to file a brief as amici curiae GRANTED.
22	Jun 22 1984		Brief of respondent William Lee Kovacs filed.
23	Jun 23 1984		Record filed.
24	Jun 23 1984		Certified copy of joint appendix & C.A. proceedings received.
25	Aug 8 1984		CIRCULATED.
27	Aug 10 1984		SET FOR ARGUMENT. Wednesday, October 10, 1984. (3rd case)
28	Sep 21 1984	D	Motion of Thomas J. O'Neill, Trustee in Bankruptcy of Guanta Resources Corporation, Debtor, for leave to file a brief as amicus curiae, out-of-time filed.
29	Oct 3 1984		Opposition of Ohio to motion of Thomas J. O'Neill, Trustee in Bankruptcy of Guanta filed.

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Entry	Date	Note	Proceedings and Orders
30	Oct 3 1984	X	Reply brief of petitioner Ohio filed.
31	Oct 9 1984		Motion of Thomas J. O'Neill, Trustee in Bankruptcy of Guanta Resources Corporation, Debtor, for leave to file a brief as amicus curiae, out-of-time DENIED. Justice Marshall OUT.
32	Oct 10 1984		ARGUED.

PETITION FOR WRIT OF CERTIORARI

83-1020

Office Supreme Court, U.S.
FILED
DEC 19 1983
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CASE NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

IN RE: WILLIAM LEE KOVACS,
Debtor

STATE OF OHIO,
Petitioner-Appellant,

v.

WILLIAM LEE KOVACS, d/b/a, B & W Enterprises; Hamilton Industrial Real Estate Company; Resort Rentals; and Whitco Enterprises,
Respondent-Appellee.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ANTHONY J. CELEBREZZE, JR.
Attorney General of Ohio

E. DENNIS MUCHNICKI
Assistant Attorney General

State Office Tower
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
(614) 466-2766

Counsel of Record for Petitioner

QUESTION PRESENTED FOR REVIEW

1. WHETHER A DEBTOR'S PRE–PETITION OBLIGATION TO COMPLY WITH AN INJUNCTION ISSUED BY A STATE COURT REQUIRING A CLEAN UP OF A HAZARDOUS WASTE STORAGE SITE AND ABATEMENT OF THE THREAT TO PUBLIC HEALTH AND SAFETY PRESENTED BY THAT SITE IS A "DEBT" OR "CLAIM" SUSCEPTIBLE TO DISCHARGE IN BANKRUPTCY.

PARTIES TO THE PROCEEDINGS BELOW

The petition to this court for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is sought by the State of Ohio on the relation of its Attorney General, Anthony J. Celebrezze, Jr. The State was a party to an adversary proceeding before the bankruptcy court for the Southern District of Ohio which court issued a decision holding that Kovacs' obligation to comply with an injunction issued by the Butler County Court of Common Pleas requiring him to remove all hazardous waste from the Chem-Dyne site in Hamilton, Ohio, was a "claim" or "debt" which was subject to discharge in bankruptcy. The State was the appellant in the proceeding in the Sixth Circuit. William Lee Kovacs, d/b/a, B & W Enterprises, Hamilton Industrial Real Estate Company, Resort Rentals and Whitco Enterprises, (hereinafter "Kovacs" or "Debtor") is the debtor in the bankruptcy case. Nominally named as a plaintiff in the adversary complaint which was filed in the bankruptcy court by the State of Ohio is Jack Zettler, the receiver appointed by the state court to supervise the implementation of its cleanup order, and nominally named as a defendant is E. Hanlin Bavely, the bankruptcy trustee. Neither Bavely nor Zettler has filed any pleadings in appeals from the bankruptcy court's determination of dischargeability, although Zettler has orally indicated his concurrence with the State of Ohio's position.

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OPINIONS BELOW

The opinion of the Sixth Circuit in *State of Ohio v. Kovacs* is reported at 717 F.2d 984 (6th Cir. 1983), and is set out for the Court's convenience in Appendix A. The decision of the district court affirming the bankruptcy court is not reported. The bankruptcy court's original decision that the obligation to comply with the state court injunction was dischargeable is set forth at 29 W.B.R. 816 (Bkrtcy. S.D. Ohio, 1982). The district and bankruptcy court opinions are set forth for this Court's convenience in Appendices B and C.

JURISDICTION

The judgment of the Court of Appeals was entered on September 22, 1983. The jurisdiction of this Court to review that judgment is invoked pursuant to 28 U.S.C. Section 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves an interpretation of the terms "debt" and "claim" as defined in the Bankruptcy Reform Act of 1978, 11 U.S.C. Section 101(4) and (11), as they relate to the scope of discharge established by the Bankruptcy Code, 11 U.S.C. Section 727(b). The relevant provisions of the Bankruptcy Act of 1978 are set forth in Appendix J.

STATEMENT OF THE CASE

Nature of the Case

This case is the companion case to *State of Ohio v. Kovacs*, 681 F. 2d 454 (6th Cir. 1982), vacated and remanded for further consideration, _____U.S._____, 103 S.Ct. 810 (1983) (hereinafter *"Kovacs I"*), which was before this Court last year. In *Kovacs I* Ohio had petitioned to this Court from the Sixth Circuit's holding that Ohio's efforts to enforce an injunction obtained in state court requiring Debtor Kovacs to abate the threat to public health and safety presented by the hazardous chemcial waste stored at the Chem-Dyne site in Hamilton, Ohio, was subject to the automatic stay of the Bankruptcy Code, 11 U.S.C. Section 362. In responding to that petition Debtor Kovacs argued that the stay appeal was moot because the district court had recently affirmed the bankruptcy court's determination that Kovacs' obligation to comply with the injunction was dischargeable in bankruptcy. In reply, Ohio argued that its petition was not moot because the bankruptcy court's determination of dischargeability was erroneous and could be reversed in the appeal from that decision which Ohio had recently filed with the Sixth Circuit. This Court granted Ohio's petition, vacated the Sixth Circuit's decision, and remanded for consideration of mootness in light of the pending dischargeability appeal.

Ohio's current petition is from the Sixth Circuit's decision in the dischargeability appeal. In affirming the district and bankruptcy courts' determinations of dischargeability, the Sixth Circuit expressly relied upon and readopted its "injunctions which require the performance of acts which necessitate the expenditure of money are really money judgments" rationale of *Kovacs I* which this

Court had previously vacated. Thus, the issue common to both this case and *Kovacs I*, the extent to which bankruptcy courts may interfere with state court injunctions mandating the abatement of conditions which threaten public health and environmental quality, is now firmly before this Court for resolution.

The Sixth Circuit's consideration of the mootness issue remanded to it in *Kovacs I* remains pending before it. Presumably the Circuit is waiting for this Court's action on the instant petition for certiorari in order to determine whether its dischargeability decision makes the stay appeal moot.

The Proceedings Below

After Kovacs had filed in the bankruptcy court his motion for imposition of the automatic statutory stay, Ohio filed in the same bankruptcy court on October 20, 1980, an adversary complaint seeking a declaratory judgment that the obligation to comply with the injunctions imposed upon Debtor Kovacs by the Butler County Court of Common Pleas to clean up the Chem-Dyne chemical waste storage site is not dischargeable in bankruptcy. (The adversary complaint is included as Appendix E). After the filing of a Stipulation and attached exhibits on July 29, 1981 (The Stipulation is included as Appendix F), the State filed a motion for summary judgment. Although the State requested oral argument on the motion, the bankruptcy court decided the motion without the benefit of oral argument. On February 23, 1982, the court denied the State's motion for summary judgment on the grounds that the injunctions were subject to discharge in bankruptcy. (The bankruptcy court's decision is included as Appendix C). Because the decision on the motion for summary judgment was dispositive of the case, final judgment was

entered for Debtor Kovacs. The State, unable to obtain the consent of the Debtor to a direct appeal to the Sixth Circuit, filed a timely appeal to the district court. The district court, in its decision of September 17, 1982, affirmed the bankruptcy court's decision. (The district court's decision is included as Appendix B). The district court based its affirmance of the bankruptcy court on the Sixth Circuit's decision in *Kovacs I* which it treated as "law of the case".

At the time of the State's appeal on the discharge issue to the Sixth Circuit, this Court had vacated the Circuit's prior decision in *Kovacs I*, and thus the "law of the case" doctrine on longer applied. In deciding the instant case, however, the Sixth Circuit expressly readopted the rationale of *Kovacs I* and once more ruled in favor of Kovacs against the State.

Facts Necessary for Review

On September 29, 1976, the State of Ohio, on the relation of its Attorney General, Director of Environmental Protection, and Department of Natural Resources, filed suit in the Butler County, Ohio, Court of Common Pleas, Case No. CV76-09-0834, against, among others, the Chem-Dyne Corporation and William Lee Kovacs, individually and as an officer of Chem-Dyne, alleging, *inter alia*, that defendants had caused the unlawful discharge of toxic water pollutants, i.e., the pesticides endrin, dieldrin and heptachlor, into the waters of the state in violation of Chapter 6111 of the Ohio Revised Code; that the defendants had caused air pollution nuisance in violation of Chapter 3767 of the Ohio Revised Code; and that the defendants' illegal water pollution had caused the death of numerous wild animals, including fish. The Chem-Dyne Corporation was an industrial and chemical waste treatment, recycle, storage

and disposal company located at 500 Ford Boulevard in the middle of the City of Hamilton, Butler County, Ohio. William Lee Kovacs was one of the two principal corporate officers of the company and was named as a defendant both as an officer of the corporation and individually because the State contended that many of the unlawful acts were committed at his direction and in his presence.

On July 18, 1979, after more than two (2) years of negotiation, a Stipulation and Judgment Entry was entered in the case. (The Stipulation and Judgment Entry is incuded as Appendix G). Kovacs personally signed the Stipulation and Judgment Entry. In that Stipulation and Judgment Entry the State of Ohio alleged that the defendants had caused water pollution, nuisance conditions and fish kills in violation of Chapters 6111, 3767 and 1531 of the Ohio Revised Code. Finding No. 1 of the Stipulation established that the defendants were in the business of hauling, recycling and redistributing hazardous industrial waste. The Stipulation and Judgment Entry contained a Finding No. 7 that the defendants had chemical wastes and other types of wastes stored on their premises at 500 Ford Boulevard, Hamilton, Ohio, in the amount of 850,000 gallons in liquid form and 4,000 barrels of solid or semi-solid sludges. In Orders 1 and 2 of the Judgment Entry defendants were enjoined to abate water pollution and nuisance conditions at 500 Ford Boulevard. In Order No. 3 the defendants were ordered to remove all the industrial and other chemical wastes described in Finding No. 7 from the premises at Ford Boulevard within 12 months. In Order No. 8, the defendants were directed to pay $75,000 to the Ohio Department of Natural Resources as compensation for the alleged fish kills.*

*That part of the order imposing a $75,000 money judgment to Ohio DNR is not at issue in this case. The State recognizes this as a money judg-

On February 1, 1980, in a written opinion Judge Robert L. Marrs, Butler County Court of Common Pleas, granted the State's motion to have a receivership imposed over the defendants. (The common pleas court's decision is included as Appendix H). In granting the State's motion the court specifically found that the defendants had failed to remove the industrial and hazardous wastes stored in Hamilton as required by Order No. 3 of the Stipulation and Judgment Entry. The court specifically noted that the defendants had operated in "flagrant disregard of the Stipulation and Judgment Decree." (App. H at A-54). The court also declared that:

> Defendants in this case are engaged in a business that definitely affects this entire community and conceivably the water for this entire area as well as the wild life, natural resources of the area, and the fish in the streams. Mr. Kovacs is engaged in businesses that very definitely have a wide spread effect on the community life and its daily operation and is affected with a public interest which invokes the equity powers of the Court. (App. H at A-55).

On February 4, 1980, the court entered an order appointing Jack Zettler as receiver and directing the defendants, including Kovacs, to turn over their assets to the receiver for use by the receiver in fulfilling the cleanup obligations imposed upon the defendants in the July 18, 1979 Stipulation and Judgment Entry. (The Order appointing Receiver is included as Appendix I). The order also contained an injunction imposing upon Kovacs a continuing duty to cooperate with the receiver to complete the removal of wastes.

---

ment which is dischargeable in bankruptcy. DNR has therefore filed its proof of claim and is using the remedies provided in the Bankruptcy Code to satisfy its money judgment. This appeal deals strictly with the dischargeability of the injunctions contained in Orders 1, 2 and 3 of the July 18, 1979, Stipulation and Judgment Entry.

On July 17, 1980, Kovacs filed a petition for reorganization pursuant to Chapter XI of the Bankruptcy Code, 11 U.S.C. Section 101, et seq., and sought an automatic stay pursuant to 11 U.S.C. Section 362 against the state court receiver, Mr. Zettler, which was denied. Subsequently, Kovacs converted to straight bankruptcy pursuant to Chapter VII.

On September 12, 1980, the State moved the Butler County Court of Common Pleas to hold a hearing to determine whether Debtor Kovacs had additional assets which, pursuant to the court's order of February 4, 1980, should be administered by the receiver and used to complete the cleanup. Specifically, the State alleged that while the cleanup under the receiver's direction was ongoing, there was a need for additional assets to complete the removal and lawful disposal of the hazardous waste materials which remained on-site. Since Kovacs had obtained employment elsewhere after the appointment of the receiver, the State asked for the hearing before the common pleas court judge to determine if Kovacs, pursuant to the injunction establishing his continuing duty to cooperate with the receiver, should be required to provide additional assistance to the receiver in order to complete the removal of wastes from the site.

On September 19, 1980, Debtor Kovacs filed in the benkruptcy court a Motion for a Specific Stay seeking a

determination that the statutory stay contained in 11 U.S.C. Section 362 applied against the hearing in the Butler County Court of Common Pleas requested by Ohio on September 12. The bankruptcy court held that the automatic stay of the Bankruptcy Code, 11 U.S.C. Section 362, applied to prevent the State from compelling Kovacs to make further efforts to facilitate the clean-up. As a result, the State filed the adversary complaint which is the subject of the case which gives rise to this petition for certiorari in order to determine whether Kovacs' obligation to comply with the injunctions is dischargeable in bankruptcy.

REASONS FOR GRANTING THE PETITION

The case presents a question of profound importance to the federal, state and local governments which are attempting to protect citizens from the dangers presented to their health and safety by illegally operated chemical waste storage and disposal facilities. The use of injunctive relief to compel the abatement of environmental hazards by those who created the threats to public health and safety is one of the most potent weapons in the arsenal of environmental enforcement officials. The decisions below, however, effectively destroy this important enforcement tool. The decisions of the bankruptcy court, district court, and, most significantly, the Sixth Circuit, hold that a violator of state environmental laws may obtain from a bankruptcy court a discharge from the obligation to comply with a state court injunction requiring abatement of an environmental hazard issued in an enforcement action brought by a state pursuant to its police power authority to protect public health and safety. Not only is the decision to discharge an injunction without any precedent in the history

of bankruptcy law, but it also contravenes the express policy determination of Congress that the obligation to comply with injunctions abating threats to public health and safety are outside the scope of the discharge authorized in the Bankruptcy Reform Act of 1978. Rather than implementing the will of Congress, the Sixth Circuit expressly re-adopted the "injunctions to perform acts which require the expenditure of money are really money judgments" rationale which was expressly vacated by this Court in *Kovacs I*. In addition, the decisions below prevent the state court from holding William Kovacs responsible for his contemptuous, "flagrant disregard" of his duty to abate the peril presented to the citizens of Hamilton, Ohio, from the Chem-Dyne site. As a result, the courts below, as they did in *Kovacs I*, advance the pecuniary interests of the violator-turned-debtor at the expense of the public health and safety. Thus, once more, Ohio seeks to have this Court reverse the decision below and restore to environmental officials the enforcement tools to which Congress determined they are entitled. The State presents two grounds in support of its petition for certiorari.

I. THE DECISION BELOW REPRESENTS A SERIOUS FAILURE OF THE SIXTH CIRCUIT, DISTRICT AND BANKRUPTCY COURTS TO HONOR AND IMPLEMENT A POLICY CHOICE MADE BY CONGRESS WHICH THIS COURT, IN VIEW OF ITS SUPERVISORY POWER OVER BANKRUPTCY COURTS, SHOULD REVIEW.

A. Congress Has Determined That Only Obligations Which Are "Claims" Or "Debts" As Defined In 11 U.S.C. Section 101(4) And (11) Are Subject To Discharge In Bankruptcy.

This Court has recognized that oversight of the proper operation of the bankruptcy system is justifiable grounds for invoking the Court's supervisory authority over bankruptcy courts. *Maggio v. Zeitz*, 333 U.S. 56 (1948). Indeed, oversight of the resolution of issues concerning the implementation of the Bankruptcy Reform Act of 1978 is presenting this Court with several pressing questions. See for example, *National Labor Relations Board v. Bildisco and Bildisco*, Case No. 82-818. This case also presents such an issue of vital public importance.

This Court has held that while bankruptcy courts have equitable authority, they must exercise that authority within the limits established by Congress. *Securities and Exchange Commission v. United States Realty and Improvement Co.*, 310 U.S. 434, 455 (1940). Furthermore, when implementing a provision of the Bankruptcy Code, it must be done in the manner directed by Congress. *In re Bell*, 700 F.2d 1053, 1057 (6th Cir.

1983); *In re Cando Diamond Corp.*, 26 W.B.R. 850,851 (Bkrtcy. S.D.N.Y. 1983); *In re Robert Eugene Oakes*, 24 W.B.R. 766, 770 (Bkrtcy. N.D. Ohio, 1982). Therefore, as this Court has repeatedly held in any question of statutory construction, the Bankruptcy Code must be interpreted to implement the intent of Congress. *Philbrook v. Gladgett*, 421 U.S. 707, 713 (1975); *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195, 214-215 (1962); *People of Puerto Rico v. Shill Co.*, 302 U.S. 253, 262 (1937). The particular question presented by this case is whether the obligation to comply with an injunction to abate a threat to public health and safety issued by a state court in an action brought by state officials to enforce state environmental laws may be discharged in bankruptcy.

In liquidation proceedings, final relief in the form of discharge is authorized and governed by 11 U.S.C. Section 727(b), which provides in pertinent part:

> (b) Except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all *debts* that arose before the date of the order for relief under this chapter, and any liability on a *claim* that is determined under section 502 of this title as if such *claim* had arisen before the commencement of the case whether or not a proof of *claim* based on any such *debt* or liability is filed under section 501 of this title, and whether or not a *claim* based on any such *debt* or liability is allowed under section 502 of this title. (Emphasis supplied.)

Section 727(b) plainly indicated that only "debts" and "claims" as defined in the Bankruptcy Reform Act are dischargeable.[1] The term "debt" is defined for bankruptcy purposes as "liability on a claim". 11 U.S.C. Section 101(11). "Claim" in turn is defined at 11 U.S.C. Section 101(4) as follows:

> "claim" means --
>
> (A) *right to payment*, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
>
> (B) *right to an equitable remedy for breach of performance if such breach gives rise to a right to payment*, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured or unsecured. . . .(Emphasis supplied.)

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1. In this regard, the Bankruptcy Reform Act of 1978 is conceptually similar to its predecessor, the Bankruptcy Act of 1898. Under Section 1 (15) of the old Bankruptcy Act (former 11 U.S.C. Section 1 (15)), a discharge in bankruptcy by definition operated only to release a bankrupt "from all of his debts which . . . [were] provable in bankruptcy" (emphasis supplied), and the term "debt" itself was defined in terms of provability. See Section 1 (14) of the Bankruptcy Act, former 11 U.S.C. section 1 (14). In construing the provisions of the Bankruptcy Act, courts recognized that "[o]nly provable debts are discharged by the operation of Section 17; all other obligations of the bankrupt remain in full force." *Zwick v. Freeman*, 373 F.2d 110, 116 (2d Cir. 1967), *cert. den.* 389 U.S. 835. And see *Crawford v. Burke*, 195 U.S. 176, 186, (1904); and 1 *Collier on Bankruptcy* section 17.03, at 1580 (14th ed. 1966). Thus, the Congressional decision in the Bankruptcy Reform Act to limit the scope of discharge to items which qualify as "debts" was by no means a novel one.

The definition of "claim" in 11 U.S.C. Section 101 (4) clearly indicates that certain causes of action for equitable relief fall outside the scope of the term "claim" and therefore cannot serve as the basis of a "debt" which may be discharged in bankruptcy. Under the governing definitions of 11 U.S.C. Section 101(4) and (11), a right to an equitable remedy may constitute a "claim" and a "debt" susceptible to discharge in bankruptcy *only if:* (i) the equitable remedy is sought for breach of some performance and; (ii) such breach of performance also gives rise to an alternative right to payment. In order to determine the significance of this statutory language, this Court has repeatedly recognized that it is appropriate to examine the legislative history of the statute. *National Labor Relations Board v. Bell Aerospace Co.*, 410 U.S. 267, 274-275 (1974); *United States v. Wise*, 370 U.S. 405, 414 (1962).

The legislative history of the Bankruptcy Code establishes that the exclusion from the definition of "claim" of any right to an equitable remedy not supplemented by an alternative right to payment was not a mere legal technicality or a product of legislative inadvertence. On the contrary, the legislative history demonstrates that 11 U.S.C. Section 101(4) was drafted with full awareness of the impact of the definition of the word "claim" on the scope of discharge and of the "fresh start" accorded to debtors thereby. Therefore, the Congressional decision to make the dischargeability of rights to equitable remedies turn on the availability of alternative rights to payment represents a deliberate policy choice concerning the scope of discharge under Title 11.

B. An Equitable Remedy Fits Within The Bankruptcy Act's Definition Of "Claim" Only If A Breach Of Performance Gives Rise To An Alternative Right To Payment.

The Bankruptcy Reform Act of 1978 began as H.R. 8200 which was introduced by Representative Edwards on July 11, 1977. The term "claim" was defined in the original bill to include a "right to an equitable remedy for breach of performance if such breach does *not* give rise to a right to payment. . . ." (Emphasis supplied.)[2] H.R. 8200 was referred to the House Judiciary Committee, which reported out the bill with amendments on September 8, 1977.[3] In its report on H.R. 8200, the House Judiciary Committee made the following observations on the scope of the term "claim":

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2. A. Resnick and E. Wypski, *Bankruptcy Reform Act of 1978: A Legislative History* (hereinafter cited as "Leg. Hist."), vol. 12, document 41, at p. 3 (William S. Hein & Co., Inc., Buffalo, 1979). This work is a multi-volume compilation of all the important documentation concerning Congressional action on the Bankruptcy Reform Act. All references herein to legislative history shall cite this source by the author's volume and document numbers. (The work preserves the pagination of the original documents.)

Document 41 is the House Judiciary Committee's initial print of H.R. 8200. The Committee print set forth the language of the bill as originally introduced at pp. 1-307.

3. The Judiciary Committee amended the original definition of "claim" in two respects, neither of which is material here. The Committee amendment did not alter the above-quoted portion of the definition. See 12 *Leg. Hist.* doc. 41, at pp. 309-310 or 14 *Leg. Hist.*, doc. 44 (Cong. Rec., October 28, 1977), pg. H 11734 for the Judiciary Committee definition.

Paragraph (4) defines 'claim'. The effect of the definition is a significant departure from present law. Under present law, 'claim' is not defined in straight bankruptcy. Instead it is simply used, along with the concept of provability in section 63 of the Bankruptcy Act, to limit the kinds of obligations that are payable in a bankruptcy case. The term is defined in the debtor rehabilitation chapters of present law far more broadly. The definition in paragraph (4) adopts an even broader definition of claim than is found in the rehabilitation chapters. The definition is any right to payment, whether or not reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured. *The definition also includes as a claim an equitable right to performance that does not give rise to a right to payment. By this broadest possible definition and by use of the term throughout the title 11, especially in subchapter I of chapter 5, the bill contemplates that all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case. It permits the broadest possible relief in the bankruptcy court.*

13 *Leg. Hist.*, doc. 42 (H.R. Rept. No. 95-595, 95th Cong., 2d Sess. 1978), p. 309. (Emphasis supplied.) Thus, in contrast with the final provisions of the Bankruptcy Reform Act, early House versions of bankruptcy

reform legislation treated any right to an equitable remedy as a "claim" even though such equitable remedy did not serve as an alternative to monetary relief.

On October 31, 1977, while H.R. 8200 was before the Committee of the Whole House on the State of the Union, Senator DeConcini introduced S. 2266, the Senate's bankruptcy reform measure. The definition of "claim" in S. 2266 as originally introduced was identical to that adopted by the House Judiciary Committee in the version of H.R. 8200 then before the Committee of the Whole House.[4]

Subsequently both houses recoiled from the extreme breadth of the definition of "claim" included in the early versions of the Bankruptcy Reform Act. On July 14, 1978, the Senate Judiciary Committee reported S. 2266 with amendments, including an amendment deleting from the definition of "claim" all reference to rights to equitable remedies. 17 *Leg. Hist.*, doc. 53, p. 299 (definition in brackets); cf, 14 *Leg. Hist.*, doc. 46 (Judiciary Committee print) pp. 3-4. The Senate Finance Committee further amended the definition of "claim" but did not restore language referring to a right to an equitable remedy for breach of performance. 17 *Leg. Hist.*, doc. 53, p. 299 (definition in bold face italics). On September 7, 1978, the full Senate took up considera-

4. A side by side comparative presentation of S. 2266, as originally introduced, and H.R. 8200, as amended by the House Judiciary Committee, is set forth in a Senate Judiciary Committee print included as part of the record of Hearings before the Sub-committee on Improvements in Judicial Machinery of the Committee on the Judiciary, 95th Cong., 1st Sess., November 28, 29, December 1, 1977. 14 *Leg. Hist.*, doc. 47A. A single definition of "claim" appears at p. 6 of the Hearing, p. 4 of the Committee print. The original language of S. 2266 is also set forth in 17 *Leg. Hist.*, doc. 53, pp. 1-296, with the original Senate definition of "claim" at p. 4.

tion of H.R. 8200, substituted the text of S. 2266 (which no longer treated any rights to equitable remedies as claims), and then passed H.R. 8200 as amended. 17 *Leg. Hist.*, doc. 55 (excerpts from the Congressional Record of September 8, 1978), p. S 14745. Thus, the version of the Bankruptcy Reform Act as originally passed by the Senate deleted all references to equitable remedies from the definition of "claim" and restricted that definition exclusively to rights to payment.

On September 28, 1978, the House took up reconsideration of H.R. 8200 as amended by the Senate. Representative Edwards proposed compromise language to be inserted in lieu of the Senate amendment. 17 *Leg. Hist.*, doc. 58 (excerpts from the Congressional Record), p. H. 11047. The definition of "claim" in the substitute language proposed by Edwards is identical to the definition which appears in 11 U.S.C. section 101(4) as finally enacted. In his remarks explaining the substitute proposal Representative Edwards stated:

> Section 101(4)(B) represents a modification of the House-passed bill to include [in] the definition of 'claim' a right to an equitable remedy for breach of performance if such breach gives rise to a right to payment. This is intended to cause the liquidation or estimation of *contingent rights of payment for which there may be an alternate equitable remedy* with the result that the equitable remedy will be susceptible to being discharged in bankruptcy. For example, *in some states, a judgment for specific performance may be satisfied by an alternative right to payment, in the event*

that performance is refused; in that event the creditor entitled to performance would have a 'claim' for purposes of a proceeding under title 11.

On the other hand, rights to an equitable remedy for breach of performance with respect to which such breach does not give rise to a right to payment are not 'claim" and would therefore not be susceptible to discharge in bankruptcy.

17 *Leg. Hist.*, doc. 58 (excerpts from Congressional Record), p. H 11090. (Emphasis supplied). Ultimately the Senate concurred in the new definition of "claim" adopted by the House, and the definition in 11 U.S.C. section 101(4) was enacted into law.

The above-quoted remarks of Representative Edwards, and the nearly identical comments of Senator DeConcini,[5] evidence a recognition that the definition of "claim" affects the scope of discharge and that only those equitable remedies which constitute alternatives to monetary relief and are therefore "claims" would be susceptible to discharge. The example chosen by Representative Edwards and Senator DeConcini to illustrate the application of 11 U.S.C. Section 101(4)(B) was a situation in which a monetary award could be substituted in full and complete satisfaction of an equitable judgment.

Thus, where equitable remedies and monetary relief stand side by side as alternate remedies for the same

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5. 17 *Leg. Hist.*, doc. 59 (excerpts from Congressional Record for October 6, 1978), at p. S 17406.

breach, the statute in effect forces an "election" of the monetary remedy which clearly qualifies as a "claim" susceptible to discharge under 11 U.S.C. Section 101(4)(A). Significantly, the illustration chosen by Edwards and DeConcini, in keeping with the legislation's contract-oriented references to breaches of performance (rather than to breaches of duty), related to specific performance, an equitable remedy for breach of contract, rather than to equitable remedies to enjoin continuing or prospective torts or crimes.

Thus, Congressional consideration of the extent to which equitable obligations were to be susceptible to discharge in bankruptcy underwent three phases: first, all equitable obligations were to be subject to discharge; then as a result of a Senate amendment, no equitable obligations were to be dischargeable; and finally, only those equitable obligations which could lawfully be satisfied by an alternative right to payment were made susceptible to discharge.

C. The Equitable Obligations Imposed On Debtor Kovacs By The July 18, 1979 Stipulation And Judgment Entry And The February 4, 1980 Order Appointing Receiver Are Not "Claims" Or "Debts" Within The Meaning Of 11 U.S.C. Section 101(4) Or (11) Because Kovacs' Failure To Perform Those Obligations Does Not Give Rise To An Alternative Right To Payment.

As established by the Stipulation of the parties in the adversary proceeding before the bankruptcy court,

Ohio initiated an enforcement action in 1976 against Kovacs and the Chem-Dyne Corporation he operated for violations of state water pollution and nuisance laws. A preliminary injunction was issued against Kovacs and Chem-Dyne based upon the common pleas court's finding that they had violated Ohio environmental laws. Ultimately a consent order was entered on July 18, 1979, in which the common pleas court ordered Kovacs and Chem-Dyne to abate all violations of state water pollution and nuisance laws by removing from the Chem-Dyne site within twelve (12) months all hazardous industrial waste stored on site in a manner consistent with the time schedule contained in the order. Six months later, rather than finding the inventory of hazardous waste reduced by half, the State found the amount of hazardous material stored on site by Kovacs to have nearly doubled from the amount on site in July, 1979. As a result, on January 28, 1980, the State filed a motion for the appointment of a receiver to complete the Chem-Dyne cleanup. After a hearing on the motion, the common pleas court found as follows:

> The Court would find that with regard to the alleged violations with regard to the disposal and removal of the waste material, that there has likewise been a gross abuse by the Defendants of not properly recording the initial inventory and the allowance of additional disposal material (objectionable waste) to enter the premises and the continued operation of the business was a flagrant disregard of the Stipulation and Judgment Decree. (Appendix H, at A-54)

A receiver was then appointed on February 4, 1980, to take possession of the defendants' assets and to complete the removal of the hazardous chemical wastes as required by the injunction contained in the Stipulation and Judgment Entry. Debtor Kovacs was also enjoined to cooperate with the receiver in completing the cleanup. (The order appointing receiver is set forth in Appendix I.)

Based upon the aforementioned undisputed facts and the analysis in the first part of this brief of the legislative history of the Bankruptcy Reform Act, the State contends that as a matter of law, Kovacs' obligation to comply with the injunctions contained in the July 18, 1979 Stipulation and Judgment Entry are not "debts" or "claims" as defined in 11 U.S.C. Section 101 (4) or (11). The basis for the State's position is that there exists no right to payment which may be made by Kovacs or received by the State *as an alternative to performance* of the environmental cleanup mandated by the court. Rather, any expenditure by Kovacs is to *assist in the performance of the hazardous waste cleanup, not as an alternative* to abating the threat to the citizens of Hamilton, Ohio.

The absence of any right in Kovacs to make a monetary payment in lieu of performance is repeatedly evident in the record. First, the July 18, 1979, Judgment Entry of the common pleas court provides Kovacs with no alternative to performance of the Chem-Dyne cleanup. (Appendix G) A review of that document establishes that the injunctions contained therein are absolute and unconditional. Kovacs is ordered to refrain from causing water pollution and nuisance conditions by removing the hazardous chemical wastes from the site in Hamilton, Ohio. Nowhere in the Judgment Entry is Kovacs given a

choice between removing the chemicals and paying a sum of money to the treasury of the State of Ohio while leaving the hazardous materials on site to pose a continuing peril to the citizens of Hamilton. Furthermore, nothing in the Judgment Entry allows the State of Ohio to accept a payment of money in lieu of abatement of the public hazard. Instead, the injunctions are absolutely clear and unequivocal. Kovacs is to remove the chemicals which present a peril to the citizens of Hamilton, Ohio, not pay an amount into the state treasury which may benefit all Ohioans generally but does nothing for the people of Hamilton.

Furthermore, no other provision of Ohio law allows Kovacs to make a monetary payment in lieu of abating the threat to the safety of Hamilton. Indeed, the State is aware of no law in Ohio or anywhere in the United States which holds that a person against whom an injunction has been issued to abate a public health hazard can avoid his duty to abate the hazard by paying a sum of money to the state treasury while leaving the hazard unabated. No person may purchase the right to create a public health hazard or cause water pollution and threaten the lives of others. Indeed, the very suggestion that someone may purchase the right to violate state law and endanger the lives of others must be emphatically rejected.

The reality of the situation is that there is no alternative to performance of the injunction to abate the peril to the people of Hamilton. Kovacs can make no payment to anyone and thereby leave the continuing threat to the citizens of Ohio unabated. Rather, any expenditure by Kovacs goes to assist in the cleanup. Therefore, it is clear that Kovacs' duty to comply with the common pleas court's injunction mandating the Chem-Dyne cleanup and

the injunction requiring Kovacs to assist the receiver in completing the abatement project are not dischargeable in bankruptcy.

D. The Decision Below Refuses To Implement The Express Will Of Congress Concerning The Scope Of Discharge Which Is Applicable To Equitable Obligations.

While it is clear that Congress expressly declined to extend the scope of discharge to include injunctive relief such as involved in the case at bar, the decision below refuses to implement that congressional policy determination. Instead, the court of appeals chose to rely upon the rationale of its decision in *Kovacs I*, which was vacated by this Court.

The rationale of the court of appeals decision is contained on pages seven (7) through nine (9) of the opinion. The court below labeled as "futile" Ohio's reliance upon the remarks of Representative Edwards and Senator DeConcini, the sponsors of the legislation, that discharge applies only to those equitable obligations which may be satisfied by an alternative right to payment in lieu of performance. The court then continued as follows:

> Ohio does not suggest that Kovacs is capable of personally cleaning up the environmental damage he may have caused. Ohio claims there is no alternative right to payment, but when Kovacs failed to perform, state law gave a receiver

> *total control over all Kovacs' assets. . . . In reality, the only type of performance in which Ohio is now interested is a money payment to effectuate the Chem-Dyne cleanup.*

717 F.2d at 987 (Emphasis supplied).

Thus, the court of appeals expressly recognized that any expenditure made by Kovacs would not be as an alternative to performance of the cleanup, but rather was to implement the cleanup. The court then relied upon the rationale of *Kovacs I* that Ohio was seeking to compel William Kovacs to spend money.[6] *Id.* at 988. What the court refused to recognize, however, is that since Ohio is seeking to compel Kovacs to make expenditures to "effectuate" performance of the cleanup rather than as an alternative to performance, Congress has expressly placed such obligations outside the scope of discharge.

In essence, the decision below contravenes some of the most basic principles of statutory construction established by this Court. In *National Woodwork Manufacturers' Association v. National Labor Relations Board*, 386 U.S. 612, 640 (1967), *rehearing denied*, 387 U.S. 926 (1967), this Court noted that the statements in

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6. There is some language in the decision, *Id.* at 988, concerning a monetary claim which the State may some day make for environmental damage due to Kovacs' failure to clean up the Chem-Dyne site. The court correctly notes that the discharge of such a claim would be determined pursuant 11 U.S.C. section 523. The court does not seem to appreciate, however, that such a claim is not involved in this case. Ohio's adversary complaint to determine non-dischargeability entirely relates to Kovacs' duty to clean up the site pursuant to the state court injunction, not to a monetary claim to the State resulting from that failure. See Appendix E.

the legislative history made by the sponsors of legislation, such as Representative Edwards and Senator DeConcini in the case at bar, are of particular importance in determining legislative intent. Even more to the point is the Court's observation in *United States v. Emmons*, 410 U.S. 396, 404, fn. 14 (1973) that:

> Surely an interpretation placed by the sponsor of a bill on the very language subsequently adopted by Congress cannot be dismissed out of hand. . . .

Yet this is exactly what happened below. The court of appeals dismissed "out of hand" the explanations of Representative Edwards and Senator DeConcini that the compromise language actually enacted by Congress limited the scope of discharge of equitable obligations to those which include a right of payment as an alternative to performance rather than, as in the case at bar, expenditures to effectuate performance.

In addition, the decision below disregards this Court's repeated holdings that the courts should not interpret statutes to create results which Congress specifically rejected. *Gulf Oil Corporation v. Copp Co.*, 419 U.S. 186, 200 (1974); *Sinclair Refining Co. V. Atkinson, supra*, at 214-215; *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 125-126 (1942). As the legislative history of the Bankruptcy Code clearly establishes, Congress specifically rejected inclusion of all equitable obligations within the scope of discharge. Rather, Congress determined that only those equitable obligations which may be satisfied by an alternative right to payment in lieu of performance could be discharged. In other words, Congress clearly distinguished between

those obligations which require the performance of an act whether or not funds must be spent to accomplish those acts, and injunctions which really involve making a monetary profit and which can be satisfied by the payment of money rather than the performance of the act.

The case at bar involves the performance of an act, which must be performed, abating a peril to the health and safety of the citizens of Hamilton, Ohio. There is no alternative. Ohio is not involved in this matter "for the money". Its concern is not to make a profit. Rather, Ohio's concern is to save lives. Thus, the injunctions at issue are outside of the scope of discharge established by Congress. The decision below, however, refuses to implement the policy judgment made by Congress and instead attempts to reshape the Bankruptcy Code in a manner which is more acceptable to the court below. As this Court noted, however, in *Sinclair Refining Co.*, *supra* at 215:

> In dealing with problems of interpretation and application of federal statutes, we have no power to change deliberate choices of legislative policy that Congress has made within its constitutional powers. Where Congressional intent is discernible—and here it seems crystal clear—we must give effect to that intent.

In the case at bar the bankruptcy court, district court and court of appeals below all applied the Bankruptcy Code in the manner in which they preferred rather than as established by Congress. The result of this disregard of a Congressional policy determination is that the use of injunctive relief by state and federal environmental

enforcement officials has been severely impaired. Therefore, the State of Ohio asks this Court to grant Ohio's petition for certiorari from the decision of the Sixth Circuit below.

II. THE DECISION BELOW INVOLVES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE DECIDED BY THIS COURT, WHETHER A BANKRUPTCY COURT MAY DISCHARGE A DEBTOR'S OBLIGATION TO COMPLY WITH A STATE COURT INJUNCTION REQUIRING THE DEBTOR TO ABATE A PUBLIC HEALTH HAZARD.

When Ohio's previous petition for certiorari was before this Court in *Kovacs I*, wide support was demonstrated from fifteen (15) states and the Solicitor General urging this Court to grant Ohio's petition. That case involved the question of whether the Bankruptcy Code's automatic stay prevented Ohio from enforcing against Kovacs the state court injunction to clean up the Chem-Dyne site. This Court granted Ohio's petition, vacated the Sixth Circuit's decision that the automatic stay applied, and remanded for further consideration.

As indicated by the Sixth Circuit's express re-adoption of the rationale for its decision in *Kovacs I*, the same exact issue is present in this case as was present in *Kovacs I*. Indeed, if anything, the context in which the issue is presented in the case at bar is even more dramatic. *Kovacs I* concerned the question of whether the Bankruptcy Code's automatic stay could temporarily prevent enforcement of the injunction requiring Kovacs to abate

the health hazard caused by the Chem-Dyne facility. In the case at bar, however, the Sixth Circuit has gone even further. The decision below completely discharges Kovacs forever from his duty to abate the health hazard on the Chem-Dyne site. In addition, as previously noted, the decision below contravenes the express policy judgment made by Congress that such injunctive relief is outside the scope of discharge.

Thus, environmental enforcement officials are faced with a decision which, while conflicting with the Congressional intent behind the Bankruptcy Code, acutely limits the usefulness of injunctive relief to abate the threat to public health and safety eminating from illegal hazardous waste storage and disposal sites. The State respectfully submits that before this important enforcement tool is so drastically undermined, the erroneous holding of the court below should be reviewed by this Court.

CONCLUSION

The case at bar presents a situation which exemplifies a matter of vital concern to state governments across the country involving the conflict between the ability of states to protect public health and safety and the rights of persons seeking the shelter of bankruptcy. The refusal of the court below to honor Congress' policy choice concerning the placement of the obligation to comply with injunctions to abate threats to public health and safety outside the scope of discharge calls for the exercise of this Court's supervisory authority. Therefore, the State of Ohio respectfully submits that this Court should grant a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

ANTHONY J. CELEBREZZE, JR.
Attorney General of Ohio

E. DENNIS MUCHNICKI
Assistant Attorney General

State Office Tower
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
(614) 466-2766

Counsel of Record for Petitioner

CERTIFICATE OF SERVICE

I certify that three copies of this petition for writ of certiorari were mailed pursuant to Supreme Court Rule 28.3 by United States mail, first-class postage prepaid, this _____ day of December, 1983 to John A. Garretson, 118 S. Second Street, Hamilton, Ohio 45011, to William H. Eder, 900 Tri-State Building, Cincinnati, Ohio 45202; to E. Hanlin Bavely, 604 Tri-State Building, Cincinnati, Ohio 45202.

_____

E. DENNIS MUCHNICKI
Assistant Attorney General
Counsel of Record for Petitioner

APPENDIX

Office Supreme Court, U.S.
FILED
DEC 19 1983
ALEXANDER L. STEVAS,
CLERK

83-1020

CASE NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

IN RE: WILLIAM LEE KOVACS,

Debtor

STATE OF OHIO,

Petitioner-Appellant,

v.

WILLIAM LEE KOVACS, d/b/a, B & W Enterprises; Hamilton Industrial Real Estate Company; Resort Rentals; and Whitco Enterprises,

Respondent-Appellee.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

APPENDICES IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

ANTHONY J. CELEBREZZE, JR.
Attorney General of Ohio

E. DENNIS MUCHNICKI
Assistant Attorney General

State Office Tower
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
(614) 466-2766

Counsel of Record of Petitioner

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APPENDIX A

No. 82-3629
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE: WILLIAM LEE KOVACS, dba
B & W ENTERPRISES, et al.,

STATE OF OHIO, ex rel., WILLIAM J.
BROWN, Attorney General, et al.,
Plaintiffs, Appellants,

v.

WILLIAM LEE KOVACS, et al.,
Defendants, Appellees.

ON APPEAL from the United States District Court for the Southern District of Ohio, Western Division.

Decided and Filed September 22, 1983
(Reported at 717 F.2d 984)

Before: KENNEDY and WELLFORD, Circuit Judges, and McRAE, District Judge.*

WELLFORD, Circuit Judge. Plaintiff-appellant, State of Ohio, has appealed from an order of the United States District Court for the Southern District of Ohio which held that the obligation of William Lee Kovacs, appellee, under an Ohio court order, was dischargeable in

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*Honorable Robert M. McRae, Chief Judge, United States District Court for the Western District of Tennessee, sitting by designation.

Bankruptcy. A prior opinion of this Court addressed the issue of whether the same obligation was subject to the automatic stay provisions of the Bankruptcy Court. *In re Kovacs*, 681 F.2d 454 (6th Cir. 1982), *vacated and remanded*, —— U.S. ——, 51 U.S.L.W. 3596 (1983). Kovacs operated an industrial and hazardous waste disposal facility in Hamilton, Ohio. In 1976, proceedings had been instituted by Ohio's Environmental Protection Agency and Department of Natural Resources against Kovacs, individually and as an officer in Chem-Dyne Corp., Spray-Dyne Corp., and Iron-Tree, Inc., in the Court of Common Pleas of Butler County, Ohio, charging Chem-Dyne and Kovacs, in particular, with polluting the "waters of the state" with pesticides and industrial wastes. As noted in the prior opinion of this Court, "Kovacs signed a Stipulation and Judgment Entry in the Butler County Common Pleas Court on July 18, 1979, which enjoined him from causing further pollution and required him to remove all industrial wastes from the premises of Chem-Dyne Corporation within twelve months." 681 F.2d at 454.

By the following February Kovacs' compliance with this earlier judgment was substantially behind schedule, and, upon motion by Ohio, the state court appointed a receiver over Kovacs' "non-exempt property and assets along with the assets of related corporate entities.[1] The receiver was also directed to effect the clean-up of the Chem-Dyne site." 681 F.2d at 454 (footnote added).

The pertinent portions of the state court receivership order provided as follows:

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[1] The other corporations were stated to be "a part of one larger, closely held, interconnected entity." Stipulation and Judgment Entry, paragraphs 7, 8.

It is further ordered that Mr. Jack Zettler be appointed receiver of all property or assets, wherever situated, whether real or personal, tangible or intangible, and all interests, whether legal or equitable, in property or assets, of William Kovacs, except to the extent of any property exempt from the control of a receiver by operation of law;

• • •

The receiver shall have power and authority to receive and collect any and all sums of money due or owing to the defendant business entities or defendant Kovacs in any manner, whether the same are now due or shall hereafter become due and payable. . . .

• • •

It is further ordered . . . that each of the business entities and defendant Kovacs, and all officers, agents, and employees of the Defendant business entities and defendant Kovacs be enjoined and ordered to cooperate fully with the receiver in the performance of such duties or the exercise of such powers.

In July of 1980 Kovacs filed his Chapter 11 petition for personal bankruptcy. The proceedings were converted to straight bankruptcy under Chapter 7 by order of the Bankruptcy Court in September of 1980. The state of Ohio then sought by motion in the state court to "determine Kovacs' current employment status and income." 681 F.2d at 455. Kovacs, in turn, moved

in the Bankruptcy Court to restrain these state proceedings pursuant to the "automatic stay" of 11 U.S.C. Section 362.[2]

> The bankruptcy judge concluded that the State sought the information in state court about Kovacs's current income "as a preliminary to requesting an order from that court which would require that part of debtor's current income be applied" to the receiver's efforts to complete Kovacs's unfulfilled obligation to clean up the industrial wastes from the Chem-Dyne location. The bankruptcy judge determined that Kovacs was entitled to an automatic stay of the state court proceedings under 11 U.S.C. Section 362 (Supp. 1979), and accordingly enjoined the state of Ohio on October 31, 1980 from proceeding further in state court in its attempt to levy on Kovacs's post-petition earnings.

681 F.2d at 455.

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[2] The applicable provisions of 11 U.S.C. Section 362 are as follows:

Section 362. Automatic stay

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302 or 303 of this title operates as a stay, applicable to all entities, of –

* * *

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title; . . . .

(b) The filing of a petition under section 301, 302, or 303 of this title does not operate as a stay–

* * *

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) under subsection (a) (2) of this section, of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power; . . .

It was that 1980 order of the Bankruptcy Court, affirmed by the District Court, which was appealed to this Court in the earlier proceeding. Concurring with the lower courts' conclusions, this Court held that Ohio's efforts to enforce the Stipulation Judgment and the receivership order were not exempt from the automatic stay provisions, and that the automatic stay of Section 362, applied "to deny those [Ohio] units the power *to collect money* in their enforcement efforts." 681 F.2d at 456 (emphasis added). This court further agreed that

> the state of Ohio in its state court proceedings was seeking *what in essence amounted to a money judgment* against Kovacs, which was properly subject to the automatic stay.

681 F.2d 456 (emphasis added).[3]

The issue before us in the present appeal arises from an effort by the State of Ohio in the same Bankruptcy Court in October, 1980, to obtain an order that Kovacs' identical obligation under the aforesaid state court judgment is nondischargeable because it is neither a "claim" nor a "debt" as those terms are used in 11 USC Section 727(b).[4]

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[3] The Supreme Court granted Ohio's petition for certiorari from this Court's earlier decision and ruled on January 24, 1983:

> The judgment is vacated and the case remanded to the United States Court of Appeals for the Sixth Circuit to consider the question of mootness.

— U.S. —, 51 U.S.L.W. 3546 (1983).

[4] 11 U.S.C. Section 727(b) provides:

> Except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under

The Bankruptcy Court in February of 1982 ruled that "the affirmative obligation imposed upon defendant [Kovacs] by the Judgment Entry that he remove and dispose of all industrial and/or other wastes at the subject premises" was dischargeable. The Bankruptcy Judge took pains to note that the state of Ohio never claimed the obligation was exempted from dischargeability under 11 USC Section 523. The rationale for the Bankruptcy Court's decision was:

> If plaintiff is successful here, it would be able to levy on defendant's wages, the action prevented by our Prior Decision, after defendant's bankruptcy case is closed and/or the stay of 11 U.S.C. Section 362 as interpreted by our Prior Decision is no longer in force. . . .Plaintiff [Ohio] in discussing the background for the Judgment Entry says that it expected that defendant would generate sufficient funds in his ongoing business to pay for the cleanup. Moreover, we take judicial notice that plaintiff sought discovery with respect to defendant's earnings, the matter dealt with in our Prior Decision, for the purpose of levying upon his wages, a technique which has no application other than in the enforcement of a money judgment. There is no suggestion by plaintiff that defendant can render performance under the affirmative obligation other than by the payment of money. We therefore conclude that plaintiff

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this chapter, and any liability on a claim that is determined under section 502 of this title as if such claim had arisen before the commencement of the case, whether or not a proof of claim based on any such debt or liability is filed under section 501 of this title, and whether or not a claim based on any such debt or liability is allowed under section 502 of this title, [emphasis added].

> has a claim against defendant within the meaning of 11 U.S.C. Section 101(4), and that defendant owes plaintiff a debt within the meaning of 11 U.S.C. Section 101(11). Furthermore, we have concluded that that debt is dischargeable.

The essence of the decision by Bankruptcy Judge Burton Perlman was that "the significance to plaintiff [Ohio] of the affirmative obligation of the Judgment Entry is that the defendant [Kovacs] *pay compensation* . . . for pecuniary loss . . ." App. at 13.

On appeal the district court affirmed on the basis of the "law of the case" doctrine, finding "no cogent reason justifying reconsideration of the Sixth Circuit's determination in *In Re Kovacs*." The district court also agreed that "the State was in fact seeking a money judgment from Kovacs and . . . the injunction is dischargeable pursuant to 11 USC Section 727(b) . . . ."

We AFFIRM the District Court's decision, but for a different reason. Since the decision of this Court in *In re Kovacs*, *supra*, has been vacated by the Supreme Court, it can no longer constitute controlling authority, and the "law of the case" doctrine does not apply.[5]

The State of Ohio takes the position that Kovacs' obligation under the state court orders does not meet the statutory definitions of "claim" or "debt" as set forth

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[5] The Supreme Court order assumed, of course, after the Bankruptcy Court and the District Court had declared the obligation of Kovacs in controversy to be dischargeable under Section 727(b), and after this appeal was filed. The panel of this Court that considered the automatic stay aspect of the case dealing with 11 USC Section 362 has not yet had an opportunity to act on this remand.

in 11 USC Section 101(4) and (11)[6]. The obligation to Ohio under the order or injunction, says the State, is merely a right to an equitable remedy. As such, it is not a "claim," and, therefore, not dischargeable in bankruptcy unless (1) the remedy is sought for breach of performance, *and* (2) such breach also gives rise to an alternative right to payment. *See, In re Newton*, 15 B.R. 708 (N.D.Ga. 1981); *In re Button*, 8 B.R. 692 (W.D.N.Y. 1981). The State contends that it has no "alternative right to payment" under the order or state laws.

Not surprisingly, Ohio encounters great difficulty in distinguishing its actions to date from an attempt to enforce an alternative right to payment. Ohio's post-petition motion in state court to discover Kovacs' assets is described in the State's Reply Brief as a mere request,

> that the court permit development of a factual record which might provide a basis for *requiring part of Kovacs' income* "to be applied to the unfinished task of the receivership," *i.e.*, removal of the drums of chemical waste from the site. (emphasis added).

---

[6] 11 USC Section 101(4) defines a "claim" as a:

> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured; or
>
> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured or unsecured. . . .

11 U.S.C. Section 101(11) defines "debt" as "liability on a claim."

Ohio's Attorney General described this as "an imaginative mechanism for assuring that Kovacs fulfilled his duty to cooperate with the receiver." Although perhaps "imaginative," the efforts of Ohio still reveal the State's clear intention to use "part of Kovacs' income" to satisfy his obligation under the state court order.

Ohio futilely seeks support in the legislative history of Section 101(4). As an example of an equitable remedy that would be dischargeable as a claim, Representative Edwards and Senator DeConcini both refer to "a judgment for specific performance [that] may be satisfied by an alternative right to payment in the event that performance is refused." 124 Cong. Rec. H.11089, S. 17406 (1978). Ohio does not suggest that Kovacs is capable of personally cleaning up the environmental damage he may have caused. Ohio claims there is no alternative right to payment, but when Kovacs failed to perform, state law gave a state receiver total control over all Kovacs' assets. Ohio later used state law to try and discover Kovacs' post-petition income and employment status in an apparent attempt to levy on his future earnings. In reality, the only type of performance in which Ohio is now interested is a money payment to effectuate the Chem-Dyne cleanup.

If Ohio had elected to have a money penalty assessed against Kovacs for the environmental damage he caused, we would have faced a different question. Proceedings to assess such a penalty would not have been subject to automatic stay of Section 362, although enforcement of the assessment would have been stayed. *In re Tauscher*, 7 B.R. 918 (Bankr. E.D. Wis. 1981); *cf. NLRB v. Evans Plumbing Co.*, 639 F.2d 291 (5th Cir.

1981) (enforcement proceeding by NLRB). Furthermore, such a penalty might have been exempted from discharge under 11 USC Section 523.[7] Instead of pursuing this or some other route, Ohio has simply claimed that the obligation it seeks to enforce against Kovacs is not a claim or debt.

We agree, however, with the rationale of the prior opinion in *In re Kovacs, supra*, that Ohio is essentially seeking to obtain a money payment from Kovacs. The impact of its attempt to realize upon Kovac's income or property cannot be concealed by legerdemain or linguistic gymnastics. Kovacs cannot personally clean up the waste he wrongfully released into Ohio waters. He cannot perform the affirmative obligations properly imposed upon him by the State court except by paying money or transferring over his own financial resources. The State of Ohio has acknowledged this by its steadfast pursuit of payment as an alternative to personal performance.

In the absence of any contention by the State of Ohio in the Bankruptcy Court that the judgment obligation of Kovacs is exempted from discharge under some provision of Section 523, a discharge under Section 727 is warranted.

Accordingly, the judgment of the district court is AFFIRMED.

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[7] 11 U.S.C. Section 523 provides in pertinent part:

> (a) A discharge under section 727, 1141, or 1328(b) of this title does not discharge an individual debtor from any debt --
> * * *
> (6) for willful and malicious injury by the debtor to another entity or to the property of another entity;
> (7) to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, . . .

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

IN RE:

WILLIAM LEE KOVACS, dba
B & W ENTERPRISES,

Debtor,

STATE OF OHIO, ex rel
WILLIAM J. BROWN, ATTORNEY
GENERAL OF OHIO,

Plaintiffs-Appellants,

vs.

WILLIAM LEE KOVACS, et al.,

Defendants-Appellees.

No. C-1-82-526

OPINION AFFIRMING BANKRUPTCY COURT'S DETERMINATION OF DISCHARGEABILITY

SPIEGEL, J.:

This matter came before the Court for oral argument on appeal from a determination of dischargeability by Judge Burton Perlman of the United States Bankruptcy Court, Southern District of Ohio, Western Division.

Having considered plaintiffs-appellants' brief and reply brief (docs. 2, 4) and defendant-appellees' reply brief (doc. 3), as well as the evidence and the arguments of counsel, we affirm the judgment of the Bankruptcy Court.

At issue is the dischargeability of an injunction obtained as part of a settlement agreement by the State of Ohio. The injunction, entered in the Court of Common Pleas of Butler County, July 18, 1979, required, *inter alia*, defendant Kovacs to remove and dispose of all hazardous materials stored at the Chem-Dyne premises in Hamilton County within one year. *State of Ohio ex rel Brown, et al. v. Chem-Dyne Corp., et al.*, Butler County Court of Common Pleas, Case No. CV-78-09-0834. Defendant Kovacs was chief executive officer of Chem-Dyne Corporation which was in the business of disposing of and recycling industrial and hazardous wastes.

Approximately six months after the injunction was entered, the State succeeded in its attempt to have a receiver appointed over the property and assets of, among others, William Kovacs and Chem-Dyne. Subsequently defendant Kovacs filed a petition for relief, initially under the arrangement provisions of Chapter 11 and later by application under the liquidation provisions of Chapter 7 of the Bankruptcy Reform Act of 1978, 11 U.S.C. Sections 101 *et seq.* Kovacs was adjudicated bankrupt September 2, 1980.

On September 12, 1980, the State filed a motion in the Butler County Common Pleas Court for a hearing to determine the existence of any further assets of the

debtor Kovacs. Defenant Kovacs requested and the Bankruptcy Court granted a stay of these state proceedings pursuant to the automatic stay provisions of 11 U.S.C. Section 362. The Bankruptcy Court found that the State's purpose in bringing the state court action was to establish Kovacs' post-petition earnings preliminary to seeking an order which would require that part of Kovacs' post-petition earnings be applied to the receiver's efforts to clean up the Chem-Dyne facility. The State appealed to this Court which affirmed the action of the Bankruptcy Court. The State then appealed to the United States Court of Appeals for the Sixth Circuit which also affirmed, stating, "[w]e further concur with the conclusion of the bankruptcy court and the district court that the state of Ohio in its state court proceedings was seeking what in essence amounted to a money judgment against Kovacs." *In Re Kovacs*, Case No. 81-3320 (June 16, 1982).

In October, 1980 the State sought a declaration from the Bankruptcy Court that the obligation imposed upon Kovacs by the injunction to clean up the Chem-Dyne facilities was not subject to discharge pursuant to 11 U.S.C. Section 727(b). Judge Perlman denied the State's motion for summary judgment, finding the injunction subject to discharge.

In essence, the State's argument is that only "claims" or "debts" are dischargeable in bankruptcy pursuant to 11 U.S.C. Section 727(b). "Debt" is defined by the Bankruptcy Reform Act as liability on a claim, 11 U.S.C. Section 101(11). "Claim" is defined as a "right to payment" or a "right to equitable remedy for breach of performance if such breach gives rise to a right to pay-

ment." 11 U.S.C. Section 101(4). In an extensive discussion of the legislative history, the State argues that Congress intended to make the dischargeability of rights to equitable remedies turn on the availability of alternative rights to payment. Because, according to the State, Kovacs' failure to comply with the injunction does not give rise to a right to payment under Ohio law, the injunction is not dischargeable (doc. 2). Plaintiff also asserts that the State is not seeking to compel payment from defendant Kovacs but rather to have the Butler County Common Pleas Court establish a new rate of clean-up more commensurate with Kovacs' changed financial condition (doc. 4).

Defendant Kovacs agrees that the key issue in determining whether an obligation under a state court order is a "debt" within the meaning of the dischargeability provisions of the Bankruptcy Act, is whether the debtor's estate can be compelled to pay money in compliance with the order. Defendant argues that the State is estopped from denying that it has no such right. Pointing to the State's motion in the Butler County Common Pleas Court for a hearing to determine Kovacs' post-petition income and employment status, defendant maintains that the State cannot on the one hand seek to compel payment from Kovacs and on the other hand argue that it has no right to such payment (doc. 3).

The Court accepts that the existence of an alternative right to payment determines whether an obligation to perform created by court order is dischargeable pursuant to 11 U.S.C. Section 727(b). *In re Newton*, 15 B.R. 708 (N.D. Ga. 1981); *In Re Button*, 8 B.R. 682 (W.D. N.Y. 1981). We also recognize that defendant has not clearly established that Ohio law provides for an

alternative right of payment. Nevertheless, we conclude that, under the law of the case principles, we must accept the determination of the Sixth Circuit that the State was seeking what amounted to a money judgment against Kovacs. *In Re Kovacs, supra.*

Law of the case doctrine embodies the principle that a decision of the appellate court, unless properly set aside, should be followed at subsequent stages of the litigation in the interest of consistency and to avoid reconsideration of matters already settled. Although courts have the power to reconsider issues, *Messenger v. Anderson*, 225 U.S. 436, 444 (Holmes, J.), most courts state that reconsideration is justified only where there has been an intervening change in controlling law, new evidence has become available, there is a need to correct an obvious error, or to prevent manifest injustice. *Petition of United States Steel Corp.*, 479 F. 2d 489, 493-494 (6th Cir. 1973) *cert. denied* 414 U.S. 859. Federal district courts should be particularly cautious about ignoring the findings of controlling circuit courts. *Id.* at 493.

We find no cogent reason justifying reconsideration of the Sixth Circuit's determination in *In Re Kovacs, supra.* Plainuff-appellant has cited to no change in the law or new evidence. Although counsel for plaintiff challenges the correctness of the Sixth Circuit's finding, we are not persuaded that there is error in that court's determination that the State was seeking a money judgment from Kovacs as an alternative to requiring Kovacs personally to perform the obligations imposed by the injunction. If there is error, it is certainly not obvious.

Finally, no injustice will result from our following the law of the case in this instance. On the contrary, the finding that the State was in fact seeking a money judgment from Kovacs and that consequently the injunction is dischargeable pursuant to 11 U.S.C. Section 727(b) is in harmony with the principles of rehabilitation underlying the Bankruptcy Reform Act of 1978. To find that the injunction is not dischargeable would subvert Congress' clear intention to give debtors a fresh start.

The Court, therefore, affirms the decision of the Bankruptcy Court.

SO ORDERED.

/s/ S. Arthur Spiegel
S. Arthur Spiegel
United States District Judge

APPENDIX C

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

IN RE

WILLIAM LEE KOVACS
dba/ B & W Enterprises,
Hamilton Industrial Real
Estate Company, Resort
Rentals and Whitco
Enterprises

Debtor

STATE OF OHIO, ex rel.
WILLIAM J. BROWN,
ATTORNEY GENERAL OF OHIO,
et al,

Plaintiff

-v-

WILLIAM LEE KOVACS, et al.,
Adversary File No. 1-80-0249
(Related Case No. 1-80-01499)

DECISION AND ORDER ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

(Reported at 29 W.B.R. 816)
ENTERED FEB 23 '82
BANKRUPTCY JUDGES CINCINNATI, OHIO

At Cincinnati; in said District, on the *23rd* day of February, 1982:

Defendant in this adversary proceeding is debtor in the related bankruptcy case. Defendant was a party to state court litigation brought by the State of Ohio, on the relation of its Attorney General, director of Environmental Protection and Department of Natural Resources, which eventuated in an agreed Judgment Entry filed in the Butler County Court of Common Pleas. That Entry personally bound defendant to certain obligations. In the instant litigation, the plaintiff State of Ohio seeks a declaration that the obligations imposed upon defendant by the consent decree are non-dischargeable. It is to be noted that the complaint in this proceeding is not limited to the foregoing relief, but seeks in addition relief by way of an injunction against defendant and the trustee from taking any action to recover assets from the state court receiver or from interfering with that receiver in the performance of his duties.

The evidentiary record upon which this motion proceeds consists entirely of a stipulation entered into between the parties to which are attached Exhibits A through J. The following facts are found based upon the stipulation. Defendant and one Bruce Whitten were the chief executive officers of Chem-Dyne Corporation which was engaged in the business of brokering, hauling, storing disposing and recycling of industrial and hazardous waste at a facility in Hamilton Ohio. The State of Ohio filed the above mentioned suit in Butler County Common Pleas Court against Chem-Dyne Corporation, other corporate entities, and Whitten and defendant, the latter being sued both as individuals and officers of Chem-

Dyne. The gravamen of the complaint was that defendants had caused water pollution and a public nuisance, contrary to the laws of Ohio, by the manner which they conducted their business. The litigation was terminated by a stipulation and Judgment Entry filed on July 18, 1979 which Entry was signed personally by defendant. The Judgment Entry ordered the defendants, including defendant here, inter alia, to: refrain from causing water pollution; refrain from causing or allowing the emission of noxious exhalations or noisome or offensive smells; remove and dispose of all industrial waste and/or other wastes on the premises within twelve (12) months; and pay $75,000.00 to the Department of Natural Resources. Because defendants did not do what was required of them by the Judgment Entry, the State of Ohio sought appointment of a receiver to accomplish the requirements of the Judgment Entry. The court granted that motion and appointed a receiver. The order appointing the receiver established, inter alia, the receiver's authority and powers to carry into effect the obligations imposed upon defendant and the others by the Judgment Entry, and required defendant to cooperate with the reciever.

In its memorandum in chief (p. 15) movant states the provision of the Judgment Entry imposing obligations upon defendants which plaintiff here seeks to have declared non-dischargeable: to refrain from causing water pollution in violation of Chapter 6111; refrain from creating a nuisance by not causing or allowing the emission of noxious exhalations or noisome or offensive smells, to remove and dispose of all industrial and/or other wastes from the premises at 500 Ford Boulevard within twelve months from the signing of the order; and to make a certain payment to the Ohio Department

of Natural Resources. (In its memorandum plaintiff says that the instant proceeding does not concern the obligation of defendant to pay a monetary penalty to the Division of Wild-life, since plaintiff concedes that that provision creates a right to payment which constitutes a claim, and therefore the last named injuctive provision is not, says the plaintiff, to be a subject of the present motion.) Furthermore, it is clear that the negative injunctions, to refrain from causing water pollution etc. and to refrain from creating a nuisance etc. are mooted since defendant is not in possession of the premises, since a receiver has been installed there. This leaves as the real subject of the present motion the affirmative obligation imposed upon defendant by the Judgment Entry that he remove and dispose of all industrial and/or other wastes at the subject premises. It is plaintiff's position that this obligation is non-dischargeable as a matter of law. Its theory is that that obligation does not constitute a claim or debt susceptible to discharge under 11 U.S.C. Section 727(b), and a discharge extends only to debts and claims.

While the complaint in this proceeding to the extent here relevant is entitled Complaint to Determine Non-Dischargeability, the usual section of the Bankruptcy Code which comes into play when questions of dischargeability arise, 11 U.S.C. Section 523, is not invoked by plaintiff. Instead, plaintiff appears to seek a declaration that the aforementioned affirmative obligation of the state court Judgment Entry will not be discharged by the discharge which may be granted to debtor in the related bankruptcy case.

As a relevant part of the background to the present initative of plaintiff State of Ohio, we note that in the

related bankruptcy case of debtor, on October 31, 1980 there was entered a Decision (hereafter "Prior Decision") by this court on debtor's Motion for Specific Stay Order. In that Motion, debtor had sought to restrain proceedings brought by the State of Ohio in the Butler County Common Pleas Court designed to recover from the debtor post-petition personal earnings. We granted that motion, holding that efforts to make such collection were within the stay provisions of 11 U.S.C. Section 362. In our Decision, we said that: "We hold, therefore, that the State is estopped to deny that it is not seeking to enforce a money judgment against debtor." The District Court affirmed our Decision (April 30, 1981), the Court making express mention with approval of the above quoted holding. We are informed that the State of Ohio is pursuing a further appeal to the Sixth Circuit Court of Appeals in that matter.

What is at stake in the present motion is whether defendant's bankruptcy will discharge the affirmative obligation imposed upon him by the Judgment Entry, that he remove and dispose of all industrial and/or other wastes at the subject premises. If plaintiff is successful here, it would be able to levy on defendant's wages, the action prevented by our Prior Decision, after defendant's bankruptcy case is closed and/or the stay of 11 U.S.C. Section 362 as interpreted by our Prior Decision is no longer in force. The parties have crystallized the issue here in simple fashion, plaintiff stoutly insisting that the just identified affirmative obligation is not a monetary obligation, while defendant says that it is. The problem arises, of course, because it is not stated as a monetary obligation. Essentially for this reason plaintiff argues that it is not a monetary obligation. Yet plaintiff in

discussing the background for the Judgment Entry says that it expected that defendant would generate sufficient funds in his ongoing business to pay for the clean-up. Moreover, we take judicial notice that plaintiff sought discovery with respect to defendant's earnings, the matter dealt with in our Prior Decision, for the purpose of levying upon his wages, a technique which has no application other than in the enforcement of a money judgment. There is no suggestion by plaintiff that defendant can render performance under the affirmative obligation other than by the payment of money. We therefore conclude that plaintiff has a claim against defendant within the meaning of 11 U.S.C. Section 101(4), and that defendant owes plaintiff a debt within the meaning of 11 U.S.C. Section 101(11). Furthermore, we have concluded that that debt is dischargeable.

In order for the debt to be nondischargeable, a provision with respect to it would have to be found within 11 U.S.C. Section 523. An examination of that section indicates that it is Section 523(a)(7) which is relevant. There it is provided:

> "Section 523. Exceptions to Discharge.
> (a) A discharge under section 727. . . of this title does not discharge an individual debtor from any debt . . .
> (7) to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss . . ."

It must be clear from what we have said above and without further discussion, that the significance to plaintiff

of the affirmative obligation of the Judgment Entry is that defendant pay compensation to plaintiff for pecuniary loss, that occasioned by the necessity for the clean up. Discharge of such an obligation is not barred by the provisions of 11 U.S.C. Section 523(a)(7). Plaintiff therefore is not entitled to summary judgment, since it is not entitled to judgment as a matter of law as required by B.R. 756.

In reaching this conclusion we have found the decision *In re Tauscher*, 7 B.R. 918 (B.J., Wis. 1981) in its discussion of Section 523(a)(7) illuminating. In applying that section the court found a distinction between a money penalty which was found to be nondischargeable, and back wages owed by the defendant which were found to be dischargeable.

Plaintiff with great industry has reviewed the legislative history of the Bankruptcy Code with respect to the definitions of "claim" and "debt", Section 101(4) and Section 101(11), for the purpose of demonstrating that defendant's affirmative obligation under the Judgment Entry is not a "claim". That review culminates in a formulation by plaintiff that this follows because (1) there is no authority which creates in plaintiff a right to payment as an alternative remedy to debtor's compliance with the injunction of the Judgment Entry; and (2) that debtor's conduct which entitled plaintiff to injunctive relief was a "violation of law" not a "breach of performance" and debtors failure to comply with the injunction was a "contempt of court" not a "breach of performance." An essential part of the argument of the plaintiff is that defendant owes an obligation to plaintiff by reason of the injunction to perform the acts required by the injunction, and it could not substitute for that

obligation to the State a payment of money to the State, and in order to qualify as a claim, such a right would have to exist. We are not persuaded by plaintiff's arguments. Plaintiff gives too inflexible a reading to the legislative history. Where, as here, plaintiff has itself treated its rights under the Judgment Entry as a right to payment, and in no way is it suggested that that right amounts to anything other than a right to payment, can we permit a party to hide behind words to avoid the plain thrust of the law.

Plaintiff's analysis of the case cited by defendant, *In re Button*, 8 B.R. 692 (B.J., W.D., N.Y., 1981) is both informative and inappropriate. *Button* held that a restitution order imposed as a condition of probation imposed for a criminal violation is not dischargeable in bankruptcy. Plaintiff urges that we deal with the matter before us in the same manner, as though defendant had been convicted of a crime. The law does not permit us to do that. Plaintiff seems determined to ignore the language of the District Court in its Opinion, Case No. C-1-81-59, April 30, 1981, (D.C. S.D., Ohio, Western Division), affirming our Prior Decision where Judge Judge Spiegel said:

> "Finally, the Court is somewhat disturbed by its impression that the State is attempting to punish Mr. Kovacs for not complying with the 1979 Judgment, and in the process is subverting the purpose of the Bankruptcy Code.
>
> • • •

> *There are criminal sanctions which the State may invoke against Mr. Kovacs if he has violated environmental protection laws and regulations. The Bankruptcy Code may not be used as a substitute for such criminal sanctions." (Emphasis supplied.)*

Plaintiff's motion is denied.

SO ORDERED.

Dated: February 23, 1982 */s/* Burton Perlman
BURTON PERLMAN
U.S. BANKRUPTCY
JUDGE

2/23/82 (ehr).
Copies to:

E. Dennis Muchnicki, Esq.
Steven J. Willey, Esq.
Counsel for Plaintiff
State of Ohio
Assistant Attorney General
Environmental Law Section
30 East Broad Street, 17th Flr.
Columbus, Ohio 43215

William H. Eder, Jr., Esq.
Counsel for Defendant Kovacs
900 Tri State Building
Cincinnati, Ohio 45202

John A. Garretson, Esq.
Counsel for Plaintiff-Zettler

118 South Second Street
Hamilton, Ohio 45011

E. Hamlin Bavely, Esq.
Counsel for Defendant-Trustee
1107 Tri State Building
Cincinnati, Ohio 45202

FEB 23 '82
BANKRUPTCY JUDGES
CINCINNATI, OHIO

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 82-3629

IN RE: WILLIAM LEE KOVACS, dba
B & W ENTERPRISES, et al.,
STATE OF OHIO, ex rel., WILLIAM J.
BROWN, Attorney General, et al.,
Plaintiffs-Appellants.

vs.

WILLIAM LEE KOVACS, et al.,
Defendants-Appellees.

FILED SEP 22 1983

Before: KENNEDY and WELLFORD, Circuit Judges;
and McRAE, District Judge.

JUDGMENT

ON APPEAL from the United States District Court for the Southern District of Ohio.

THIS CAUSE came on to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this court that the judgment of the said District Court in this case be and the same is hereby affirmed.

Each party to bear its own costs on this appeal.

ENTERED BY ORDER OF THE COURT
John P. Hehman, Clerk
/s/ John P. Hehman, Clerk

Issued as Mandate: October 14, 1983 A True Copy.

COSTS: None Attest:

Filing fee..... $
Printing..... $

/s/ signature deleted
Total..... $ Deputy Clerk

APPENDIX E

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

IN RE:

WILLIAM LEE KOVACS, d/b/a
B & W ENTERPRISES, HAMILTON
INDUSTRIAL REAL ESTATE COMPANY,
RESORT RENTALS AND WHITCO
ENTERPRISES,

Debtor.

STATE OF OHIO, ex rel.
WILLIAM J. BROWN, Attorney
General of Ohio,

and

JACK ZETTLER, Receiver of
the Chem-Dyne Corporation,
William Kovacs, et al.,

Plaintiffs,

v.

WILLIAM LEE KOVACS,

and

E. HANLIN BAVELY, Interim
Trustee,

Defendants.

Adversary No. 1 - 80 - 0249
Case No. 1-80-01499

COMPLAINT TO DETERMINE NON-DISCHARGEABILITY, LIFT STAY AGAINST PLAINTIFFS, AND RESTRAIN DEBTOR AND INTERIM TRUSTEE

File Stamp deleted

COUNT ONE

Plaintiffs State of Ohio and Jack Zettler respectfully represent:

(1) This Court has jurisdiction over this proceeding pursuant to 28 U.S.C.A. Section 1471.

(2) Defendant William Lee Kovacs is the debtor in Bankruptcy Case No. 1-80-01496 commenced in the United States Bankruptcy Court for the Southern District of Ohio on July 17, 1980.

(3) Defendant E. Hanlin Bavely is the Interim Trustee of debtor's estate appointed by order of this Bankruptcy Court during September of 1980.

(4) For all purposes set forth in the instant Complaint, Plaintiffs are not creditors of debtor Defendant William Lee Kovacs within the meaning of the Bankruptcy Reform Act, 11 U.S.C.A. Section 101(9).

(5) On September 26, 1976, in the exercise of the state's police power to abate and redress pollution of the

waters of the state and nuisances caused by the emission of air contaminants, the State of Ohio, through its Attorney General William J. Brown, the Director of the Ohio Environmental Protection Agency, and the Division of Wildlife of the Ohio Department of Natural Resources filed suit in Butler County Common Pleas Court, Butler County, Ohio, against William Kovacs, debtor-Defendant herein, and others (hereinafter referred to as the "state court defendants"), alleging therein that the state court defendants on several occasions discharged industrial wastes and/or other wastes, including the pesticides endrin, dieldrin and heptachlor, into the Great Miami River and the Hamilton Hydraulic Canal in violation of Ohio Revised Code Sections 6111.04 and 6111.07(A), caused a nuisance in violation of Ohio Revised Code Section 3767.13 and caused the destruction of wildlife and wildlife habitats. The demand for relief in the aforementioned state court action, styled *State of Ohio, ex rel. Brown, et al. v. Chem-Dyne Corporation, et al.*, Case No. CV76-09-0834 (Butler County Court of Common Pleas), included prayers for preliminary and permanent injunctive relief, and the assessment of a civil penalty.

(6) By and with the consent of the parties therein, including Defendant Kovacs, a Stipulation and Judgment Entry was entered by Judge Robert J. Marrs in Butler County Common Pleas Case No. CV76-09-0834 on July 18, 1979. Said Stipulation and Judgment Entry included an injunction which, *inter alia*, ordered the state court defendants and their agents and employees to remove all industrial and/or other wastes then stored at 500 Ford Boulevard, Hamilton, Ohio within twelve (12) months, with compliance to be determined on a quarterly basis.

A copy of the aforementioned Stipulation and Judgment Entry is attached hereto as Exhibit A and incorporated herein by reference as if fully set forth.

(7) In an Opinion issued in Butler County Common Pleas Case No. CV76-09-0834 on February 1, 1980, after an evidentiary hearing on a motion of the State of Ohio for appointment of a receiver, Judge Marn found, *inter alia*, that the state court defendants, including William Kovacs, had violated the injunction contained in the Stipulation and Judgment Entry of July 18, 1979 by failing to reduce the inventory of waste materials stored at 500 Ford Boulevard, Hamilton, Ohio. Based upon the aforementioned finding and upon another finding of violation of the terms of the aforementioned Stipulation and Judgment Entry, Judge Marn concluded in the aforementioned Opinion that the appointment of a receiver to "carry the judgment into effect" by performing the duty enjoined upon the state court defendants including Kovacs was authorized by Section 2734.01 of the Ohio Revised Code. A copy of the aforementioned Opinion is attached hereto as Exhibit B and incorporated herein by reference as if fully set forth.

(8) On February 4, 1980, Judge Marn entered an order in Butler County Common Pleas Case No. CV76-09-0834 appointing Jack Zettler receiver of –

> (a) All property or assets, wherever situated, whether real or personal, tangible, and all interests, whether legal or equitable, in property or assets, of William Kovacs, except to the extent of any property exempt from the control of a receiver by operation of law; and (b) Chem-Dyne Corporation, Spray-Dyne Corporation, Transenvironmental Corporation, K.O.I. Petroleum Company, Inc., Whitco Enterprises, Inc., B & W Enterprises, Hamilton Industrial Real Estate Company, and of all property or assets, wherever situated, whether real or personal, tangible or intangible, and all interests, whether legal or equitable, in property or assets of these entities.

A copy of the aforementioned February 4, 1980 Order Appointing Receiver is attached hereto as Exhibit C and incorporated herein by reference as if fully set forth.

(9) The aforementioned Order Appointing Receiver directed the receiver to effect compliance as expeditiously as practicable with all of the orders entered in the Stipulation and Judgment Entry referred to in paragraph 6, *supra*. See Exhibit C.

(10) To date the receiver appointed in Butler County Common Pleas Case No. CV76-09-0834 has not fully discharged the waste removal obligations of William Kovacs, B & W Enterprises, Hamilton Industrial Real Estate Company, and Whitco Enterprises under the Stipulation and Judgment Entry referred to in paragraph 6, *supra*.

(11) The right of the State of Ohio under the aforementioned Stipulation and Judgment Entry and Order Appointing Receiver to the removal of all industrial and/or other wastes stored on the premises of 500 Ford

Boulevard, Hamilton, Ohio is not a "claim" within the meaning of the Bankruptcy Reform Act of 1978, 11 U.S.C.A. Section 101(4), or a "debt" within the meaning of such Act, 11 U.S.C.A. Section 101(11).

(12) A discharge pursuant to 11 U.S.C.A. Section 727(a) only discharges obligations that are "debts" within 11 U.S.C.A. Section 101(4).

COUNT TWO

(13) Plaintiffs herein incorporate all of the allegations set forth in paragraphs 1 through 12, supra.

(14) The Order Appointing Receiver referred to in paragraph 8, supra, includes a provision ordering that:

> "each of the defendant business entities and defendant Kovacs, and all officers, agents, and employees of the defendant business entities and defendant Kovacs, be enjoined and restrained from in any manner interfering with the receiver in the performance of any duties or the exercise of any powers established by the provisions of this order, and that each of the defendant business entities and defendant Kovacs, and all officers, agents, and employees of the Defendant business entities and defendant Kovacs be enjoined and ordered to cooperate fully with the receiver in the performance of such duties or the exercise of such powers.

(15) In the bankruptcy proceeding in Case No. 1-86-01499 of the United States Bankruptcy Court for the Southern District of Ohio, debtor-Defendant Kovacs has sought and obtained stay orders which (a) prevent Plaintiff Zettler from exercising all of the powers and duties established in the aforementioned Order Appointing Receiver issued by the Butler County Court of Common Pleas on February 4, 1980, and (b) preclude Plaintiffs Ohio and Zettler from ascertaining the existence of, and obtaining possession of, certain assets of debtor-Defendant Kovacs subject to the state court receivership. Copies of said orders are attached hereto as Exhibit D and incorporated herein by reference as if fully set forth.

(16) Defendant Bavely has instituted in the United States Bankruptcy Court for the Southern District of Ohio, Western Division, an adversary proceeding, styled *Bavely v. Zettler*, Adversary Case No. 90-0211, to recover assets which the Court of Common Pleas of Butler County previously committed to the exclusive care and possession of the state court receiver in *State of Ohio ex rel. Brown v. Chem-Dyne Corp.*, Case No. CV70-09-0834 (Butler County Court of Common Pleas).

(17) The actions of Defendants described in paragraphs 15 and 16, supra, interfere with the rights of Plaintiffs to secure performance of the nondischargeable clean-up obligations of debtor-Defendant under the Stipulation and Judgment Entry referred to in paragraph 6, supra, and unless Defendants are restrained by this Court, Defendants will continue to interfere with the performance of such obligations.

WHEREFORE, Plaintiffs pray that this Court determine that the obligation of debtor-Defendant to remove all wastes stored at 500 Ford Boulevard, Hamilton, Ohio is not a "debt" subject to discharge under 11 U.S.C.A. Section 727; that this Court suspend all stays entered in the bankruptcy proceeding against the State of Ohio or any of its officers or employees; that this Court suspend the limited stay entered in the bankruptcy proceeding against the State court receiver; and that this Court enjoin the debtor, the Interim Trustee, and all persons acting in concert with either of them, from commencing or continuing any action to recover assets from the receiver or from otherwise interfering with the receiver in the performance of any powers or duties established in the February 4, 1980 Order Appointing Receiver entered by the Common Pleas Court of Butler County, Ohio in *State of Ohio ex rel. Brown v. Chem-Dyne Corp.*, Case No. CV76-09-0834.

Respectfully submitted,

WILLIAM J. BROWN
ATTORNEY GENERAL OF OHIO

/s/ John A. Garretson
JOHN A. GARRETSON
Attorney For Plaintiff
Jack Zettler

/s/ E. Dennis Muchnicki
E. DENNIS MUCHNICKI
Assistant Attorney General

/s/ Steven J. Willey
STEVEN J. WILLEY
Assistant Attorney General
Environmental Law Section
30 East Broad Street, 17th Floor

Columbus, Ohio 43215
(614) 466-2766

ATTORNEYS FOR PLAIN–
TIFF STATE OF OHIO

CERTIFICATE OF SERVICE

I hereby certify that on this *15th* day of October, a copy of the foregoing Adversary Complaint was served by regular U.S. Mail, postage prepaid, upon William Eder, Jr., Esq., 900 Tri-State Building, Cincinnati, Ohio 45202, and E. Hanlin Bavely, Interim Trustee, Kelly, Grossheim & Bavely, 1107 Tri-State Building, Cincinnati, Ohio 45202.

/s/ Steven J. Willey
STEVEN J. WILLEY
Assistant Attorney General

APPENDIX F

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

IN RE:

WILLIAM LEE KOVACS
dba B & W ENTERPRISES, et al.,

Debtor(s),

STATE OF OHIO, et al.,

Plaintiff,

vs.

WILLIAM LEE KOVACS, et al.,

Defendants.

Bankruptcy Case No. 1-80-01499
Adversary File No. 1-80-0249

STIPULATION

Plaintiffs State of Ohio and Jack Zettler, and Defendants William Lee Kovacs and E. Hanlin Bavely hereby stipulate that the following facts are true and accurate and may be relied upon by the Court in rendering its decision on the issues raised by the State's adversary complaint in the above-captioned proceeding and that the exhibits which are attached to this Stipulation are true and accurate copies of the documents as stated in this Stipulation:

1. Bruce Whitten and Debtor William Lee Kovacs were the chief executive officers of the Chem-Dyne Corporation which was engaged in the business of brokering, hauling, storing, disposing and recycling of industrial and hazardous waste at a facility located at 500 Ford Boulevard, Hamilton, Ohio.

2. On September 29, 1976, the State of Ohio, on the relation of its Attorney General, Director of Environmental Protection and Department of Natural Resources, filed suit in the Butler County Court of Common Pleas, Case No. CV76-09-0834, against Chem-Dyne Corporation, Spray-Dyne Corporation, Iron Tree, Inc., and Bruce Whitten and William Kovacs, both as individuals and officers of Chem-Dyne. The Complaint alleged, *inter alia*, that on eleven occasions the Defendants had caused water pollution in violation of Sections 6111.04 and 6111.07(A) of the Ohio Revised Code by placing industrial wastes including the pesticides ENDRIN, DIELDRIN and HEPTACHLOR into the Hamilton Hydraulic Canal and the Great Miami River; the Defendants had caused a public nuisance at the premises at 500 Ford Boulevard in violation of Section 3767.12 of the Ohio Revised Code by conducting their business in a manner which caused the emission of noxious odors which were injurious to the health, comfort and property of individuals and the public; and that on three occasions Defendants' acts of water pollution caused fish kills. (The Complaint is attached as Exhibit A.)

3. On October 28, 1976, the Butler County Court of Common Pleas issued a preliminary injunction restraining the Defendants from causing water pollution in violation of Chapter 6111. of the Ohio Revised Code. Said

preliminary injunction was supported by findings and fact and conclusions of law which found that Defendants had caused water pollution by placing the pesticides ENDRIN, DIELDRIN and HEPTACHLOR into the Hamilton Hydraulic Canal and Great Miami River in violation of Chapter 6111. of the Ohio Revised Code. (The Butler County Court of Common Pleas' Findings of Fact and Conclusions of Law are attached as Exhibit B.)

4. The parties engaged in settlement negotiations for over two years leading to a Stipulation and Judgment Entry which was filed in the Butler County Court of Common Pleas on July 18, 1979. Debtor Kovacs personally signed the Stipulation and Judgment Entry. The Stipulation and Judgment Entry ordered Defendants, *inter alia*, to: refrain from causing water pollution in violation of Ohio Revised Code Chapter 6111.; refrain from causing or allowing the emission of noxious exhalations or noisome of offensive smells; remove and dispose of all industrial wastes and/or other wastes on the premises at 500 Ford Boulevard within twelve (12) months of the signing of the order; and to pay the Department of Natural Resources $75,000.00. (The Stipulation and Judgment Entry is attached as Exhibit C.)

5. During the summer of 1979 Defendants Whitten and Kovacs worked out a business agreement in which Whitten allegedly sold to Kovacs Whitten's interests in Chem-Dyne Corporation.

6. On January 28, 1980, the State of Ohio filed in the Butler County Court of Common Pleas Case No.

CV76-09-0834 a motion and supporting memorandum seeking the appointment of a receiver pursuant to Section 2735.01(C) of the Ohio Revised Code which authorizes the appointment of a receiver, "after judgment, to carry the judgment into effect." In its motion and memorandum the state alleged, *inter alia*, that the appointment of a receiver was appropriate since the Defendants had failed to comply with the Stipulation and Judgment Entry of July 18, 1979. (The State's Motion to Appoint a Receiver and Memorandum in Support are attached as Exhibits D and E respectively.)

7. On January 28, 1980, the State also filed in Butler County Court of Common Pleas Case No. CV76-09-0834 a motion and supporting memorandum seeking to join as additional parties Defendants Hamilton Industrial Real Estate Company (HIRECO), KOI Petroleum Company, Inc., Transenvironmental Corporation, B & W Enterprises, and Whitco Enterprises and to extend the receivership over them. The State alleged, *inter alia*, that such entities were a part of one larger, closely held, interconnected entity and that therefore the legal fiction that the entities had a separate existence from Defendant Kovacs should be disregarded. (The State's motion and memorandum are attached as Exhibits F and G.)

8. On February 1, 1980, after a hearing on the State's motions, the Butler County Court of Common Pleas issued its decision imposing a receivership over the property and assets of William Lee Kovacs, Chem-Dyne Corporation, Spray-Dyne Corporation, Transenvironmental Corporation, KOI Petroleum Company, Inc., Whitco Enterprises, Inc., B & W Enterprises and Hamilton

Industrial Real Estate Company. (The February 1, 1980, decision of the Butler County Court of Common Pleas is attached as Exhibit H.)

9. On February 4, 1980, the Butler County Court of Common Pleas appointed Jack Zettler as receiver and issued an order establishing *inter alia*, the receiver's authority and powers to carry into effect the provisions of the Stipulation and Judgment Entry of July 18, 1979, and requiring Debtor Kovacs to cooperate with the receiver. (The February 4, 1980, Order Appointing Receiver is attached as Exhibit I.)

10. On March 3, 1980, Defendants appealed the Butler County Court of Common Pleas February 4, 1980, order to the Butler County Court of Appeals. The case is now awaiting oral argument before the Court of Appeals. (Defendants' Notice of Appeal is attached as Exhibit J.)

Respectfully submitted;

/s/ E. Dennis Muchnicki
E. Dennis Muchnicki, Counsel
for Plaintiff State of Ohio

/s/ William H. Eder, Jr.
William H. Eder, Jr., Counsel for Defendant Kovacs

/s/ Jack Garrettson
Jack Garrettson, Counsel
for Plaintiff Jack Zettler

/s/ E. Hanlin Bavely,
E. Hanlin Bavely, Defendant-Bankruptcy Trustee

APPENDIX G

IN THE
COURT OF COMMON PLEAS
BUTLER COUNTY, OHIO

STATE OF OHIO, et al.,
Plaintiffs,

vs.

CHEM–DYNE CORPORATION, et al.,
Defendants.

Case No. CV76-09-0834

Judge Marrs

STIPULATION AND JUDGMENT ENTRY

FINDINGS

(1) Defendants Whitten, Kovacs and Chem-Dyne Corporation, and their employees and agents are involved in the business of waste hauling, recycling and redistribution at their facility located at 500 Ford Boulevard, Hamilton, Ohio. Defendant Spray-Dyne produces antifreeze at the facility. These four Defendants shall collectively be referred to hereafter as "the Defendants."

(2) The Defendants have never received from the Ohio Environmental Protection Agency or U.S. EPA a National Pollutant Discharge Elimination System (hereinafter "NPDES") permit.

(3) Plaintiffs allege and Defendants deny that the Defendants and their employees and their agents have violated Sections 6111.04 and 6111.07 of the Revised

Code by negligently causing the placement of "industrial wastes" and/or "other wastes", as those terms are defined in Section 6111.01(C) and (D) of the Revised Code (hereinafter "industrial wastes" and "other wastes"), in a location where, on or about April 24, 1976; July 23, 1976; August 3, 1976; August 5, 1976; August 6, 1976; September 17, 1976; and September 23, 1976, they caused "pollution", as that term is defined in Section 6111.01(A) of the Revised Code, of "waters of the state", as that term is defined in Section 6111.01(H) of the Revised Code, specifically the Hamilton Hydraulic Canal and the Great Miami River.

(4) Plaintiffs allege and Defendants deny that the Defendants and their employees and agents negligently permitted industrial wastes and/or other wastes to enter and travel through a storm sewer system and its conduits located upon their premises and into the Hamilton Hydraulic Canal, a tributary of the Great Miami River, a watercourse of the State of Ohio.

(5) Plaintiffs allege and Defendants deny that the actions of the Defendants as alleged in Finding No. Four (4) were the direct and proximate cause of the death of over eighteen thousand, one hundred and forty-one (18,141) wild animals of the State of Ohio, as defined in Section 1531.01(X) of the Revised Code, on April 23, 1976; one million, seventy-eight thousand, forty-seven (1,078,047) wild animals, as defined in Section 1531.01(X) of the Revised Code, on July 22, 1976; and seven hundred, thirty-eight (738) wild animals, as defined in Section 1531.01(X) of the Revised Code, on August 13, 1976.

(6) Plaintiffs allege and Defendants deny that the Defendants and their employees and agents have con-

ducted their business at 500 Ford Boulevard so as to occasion the emission of noxious exhalations or noisome on offensive smells which are injurious to the health, comfort and property of individuals and the public in violation of Section 3767.12 of the Revised Code.

(7) The Defendants currently estimate that they have the following amounts of industrial wastes and/or other wastes stored at their facilities at 500 Ford Boulevard: 850,000 gallons in liquid form and 4,000 barrels of solid or semisolid sludges.

(8) Plaintiffs and Defendants are entering into this Stipulation and Judgment Entry in order to compromise all disputes and/or claims or causes of action asserted in the Complaint or which could have been asserted by the Plaintiffs to the date hereof arising from any action or actions of the Defendants.

(9) By entering into this Stipulation and Judgment Entry the Defendants do not admit any of the allegations of the Complaint and continue to deny same.

(10) Plaintiffs and Defendants agree that in any action to enforce any of the provision of this Stipulation and Judgment Entry, the Defendants may raise at that time the issue of whether they are entitled to raise a defense that its violation of the terms hereof resulted from causes beyond their control, such as, but not limited to, acts of God, of public enemies, conflicting orders of an entity having police power and jurisdiction over any of the Defendants, or impossibility of any of the Defendants of the performance of the terms hereof. While Plaintiffs disagree that such a defense exists, the parties do, however, agree and stipulate that it is pre-

mature at this time to raise and adjudicate the existence of such a defense, and that the appropriate time to adjudicate the existence of such a defense is at such time that Plaintiffs seek to enforce the provisions of this Stipulation and Judgment Entry.

ORDERS

WHEREFORE, THE PARTIES HEREBY CONSENT TO AND THE COURT HEREBY ORDERS THAT:

(1) The Defendants and their employees and agents are permanently enjoined and restrained from causing "pollution", as that term is defined in Section 6111.01(A) of the Revised Code, of "waters of the state", as that term is defined in Section 6111.01(H) of the Revised Code.

(2) The Defendants and their employees and agents are permanently enjoined and restrained from causing or allowing the emission from the facilities at 500 Ford Boulevard of noxious exhalations or noisome or offensive smells which are injurious to the health, comfort and property of individuals and the public.

(3) Within twelve (12) months of the signing of this order the Defendants and their employees and agents are to remove and dispose of all industrial wastes and/or other wastes as described in Finding No. Seven (7) from the premises at 500 Ford Boulevard. The removal is to be accomplished at the rate of a net reduction of 75,000 gallons of liquids and 340 drums of solid and semisolid sludges per month. Complaince with this schedule shall be determined every three (3) months on the basis of the

average rate of reduction over the previous three (3) months, except that during the last three (3) months the net rate of reduction must proceed at a rate of at least 75,000 gallons of liquid and 340 drums of solid and semisolid sludge in each month.

(4) The Defendants and their employees and agents are to allow the Director of the Ohio Environmental Protection Agency and/or his agents and representatives to conduct a quarterly inventory of industrial wastes and/or other wastes on the premises at 500 Ford Boulevard, and to supply to the Director and/or his agents and representatives such additional information as the Director and/or his agents and representatives reasonably determine is necessary in order to assure that the industrial wastes and/or other wastes are being removed and disposed from the premises at 500 Ford Boulevard at the rate and in accordance with the schedule established in Order No. Three (3).

(5) The removal and disposal of the industrial wastes and/or other wastes required by Order No. Three (3) shall be performed under the supervision and inspection of the Director of the Environmental Protection Agency and/or his agents and representatives.

(6) The Defendants and their employees and agents shall grant the Director of Ohio EPA and/or his agents and representatives access to enter the premises at 500 Ford Boulevard during normal business hours for the purpose of assuring that the removal and disposal of the wastes contained in Order No. Three (3) is being conducted in accordance with the compliance schedule contained in Order No. Three (3) and in accordance with such additional terms and conditions as required by the

Director and/or his agents and representatives pursuant to Order No. Four (4) and Order No. Five (5). The Defendants shall grant such access during normal business hours to the Director and/or his agents and representatives without the need for a search warrant.

(7) Upon the removal and disposal of all industrial wastes and other wastes as required by Order No. Three (3), the Defendants and their employees and agents are further permanently enjoined, restrained and ordered to refrain from any activity which would cause the importation into the premises at 500 Ford Boulevard, or the generation on the premises at 500 Ford Boulevard of any industrial or other wastes except those normally incident to the operation of offices and maintenance of trucks and trailers. The Defendants are further permanently enjoined, restrained and ordered to refrain from having any financial, legal, equitable or other interest in any activity which would cause the importation onto the premises at 500 Ford Boulevard or the generation on the premises at 500 Ford Boulevard of any industrial or other wastes except those normally incident to the operation of offices and maintenance of trucks and trailers.

(8) The Defendants shall pay to the Divison of Wildlife Ohio Department of Natural Resources, the sum of seventy-five thousand dollars ($75,000) with interest thereon at the rate of six percent (6%) as provided by law. By agreement of the Division of Wildlife and the Defendants, said judgment shall be paid according to the following terms and conditions:

(a) On or before September 1, 1979, the Defendants will pay to the order of the Division of Wildlife the sum of twenty-five thousand dollars ($25,000).

Five thousand dollars ($5,000) of said amount shall be paid within seven (7) days of the date of this Entry. The remaining twenty thousand dollars ($20,000) plus six percent (6%) per annum interest shall be paid by September 1, 1979.

(b) In addition, the Defendants will pay to the order of the Division of Wildlife twenty-five (25) consecutive monthly installments, each in the amount of two thousand dollars ($2,000) principal amount, plus interest on the unpaid balance at the rate of six percent (6%) per annum from the date of this Entry, computed as of the date of each payment; the first monthly installment of two thousand dollars ($2,000) plus interest, a total of two thousand, two hundred and fifty dollars ($2,250) shall be payable to the order of the Divison of Wildlife on or before October 1, 1979, with subsequent installments due on or before the first day of each month thereafter with the remaining unpaid balance of principal and interest payable on or before October 1, 1981.

(c) In the event that any insurance proceeds are paid to the Defendants under any contract providing liability insurance for the Defendants in settlement of the injuries and damages incurred by the State of Ohio, Division of Wildlife, as referred to above in paragraphs Four (4) and Five (5) of the Findings, such proceeds shall be immediately paid over to the order of the Division of Wildlife, to be credited toward the unpaid balance on the principal amount. The payment of any such proceeds to the Division of Wildlife shall be in addition to the $25,000 payment referred to in subparagraph (a) above. In the event that any such proceeds paid to the Division of Wildlife are not sufficient to satisfy the entire unpaid balance on the principal amount,

then the Defendants shall continue to pay the monthly installments of two thousand dollars ($2,000) plus interest as provided in subparagraph (b) above until the unpaid balance on the principal amount is extinguished.

(d) If the Defendants shall fail to pay any installment of principal or interest, or any part thereof, under this paragraph (8) when it becomes due, the Division of Wildlife shall promptly notify the Defendants of such default and shall afford Defendants ten (10) days after such notification within which to cure the default. If the Defendants default on a payment on more than three occasions, whether the default is cured or not, or if the Defendants fail to correct the default within ten (10) days after the notification provided for herein, then all of the installments and amounts remaining unpaid shall immediately become due and payable in full.

(e) Both principal and interest under the provisions of this paragraph are payable to the order of DIVISION OF WILDLIFE, OHIO DEPARTMENT OF NATURAL RESOURCES, AT 1952 Belcher Drive, Building C, Columbus, Ohio 43224, attention: Richard Francis;

(f) The notice from the Division of Wildlife to the Defendants required under subparagraph (d) shall be in writing and shall be by registered or certified mail, postage prepaid, return receipt requested, addressed as follows:

Chem-Dyne Corporation
500 Ford Boulevard
Hamilton, Ohio 45011

Attention: Bruce A. Whitten

Any notice made in accordance with this subparagraph shall be deemed notice to all and to each of the Defendants.

(9) In the event either Defendants WHITTEN or KOVACS would sell their entire interest in CHEM–DYNE CORPORATION and the property located at 500 Ford Boulevard, Hamilton, Ohio, in its entirety, to the other, the Plaintiffs hereby agree to release the selling Defendants WHITTEN or KOVACS as the case may be from the terms of this Stipulation and Judgment Entry, if the entire liability is assumed by the remaining Defendant WHITTEN or KOVACS and CHEM–DYNE CORPORATION.

In the event either the Defendants WHITTEN and KOVACS individually or jointly wish to sell all or any part of their ownership interest in CHEM–DYNE CORPORATION to a third party, the Plaintiffs shall have the right to determine at the time of said sale whether to release the selling Defendants WHITTEN or KOVACS jointly or individually as the case may be from the obligations hereunder. Furthermore, in the event of such a sale, the Defendants are hereby ordered to require that any purchaser assume the liability of the selling Defendant(s).

(10) The Defendants' Third-Party Complaint against Third Party Defendant City of Hamilton is dismissed with prejudice.

APPROVED:

signature lines deleted.

APPENDIX H

STATE OF OHIO, BUTLER COUNTY
COURT OF COMMON PLEAS

STATE OF OHIO, ex rel,
Plaintiffs

vs.

CHEM DYNE INC., et al,
Defendants

CASE NO. CV76-09-0834

OPINION

Filed February 1, 1980

MARRS, J.

This matter comming on this day for hearing to the Court upon the application of the State of Ohio for an appointment of a Receiver after a consent judgment had been filed in this cause. Evidence was presented, a number of exhibits introduced and arguments were made by counsel.

On the 18th day of July, 1979, a consent decree was filed in this cause and a Stipulation and Judgment Entry signed by Defendant Bruce Whitten, William L. Kovacs, Defendant, and Louis F. Gilligan, their attorney; Dennis Muchnicki, Assistant Attorney General for the State of Ohio and Lester W. Koehler, Law Director for the City of Hamilton. It is Stipulated by this entry that Chem Dyne Corporation, also a defendant in this Action, would be bound by its terms and the entry further provided that if defendants Whitten or Kovacs sell their interest in Chem-

Dyne Corporation, that the Stipulation and liability would be assumed by Defendants Whitten, Kovacs, or Chem Dyne Corporation. (See 9 of Stipulation and Judgment Entry).

The Stipulation and Judgment Entry has two major thrusts, namely the payment of a money judgment in the sum of $75,000 in scheduled payments (see 8), and the second thrust being in the nature of a mandatory orderly removal and disposal of "all industrial waste as described in Finding No. 7." The removal was to be systematic subject to a quarterly inventory so that ultimately the premises would be free and clear of the objectionable material.

The evidence offered by the State of Ohio clearly showed that with regard to the money judgment, the terms of the Stipulation were not complied with by the respective defendants. Evidence was offered by the defendant Kovacs to show that attempts were made by the respective defendants to satisfy the terms of the Stipulation but names appeared upon the checks after there had been a change in ownership and officers of the Corporation and said checks were not honored. However, it is to be noted that no attempt was made by the Defendant Kovacs or the Chem Dyne Corporation to properly issue the checks that had not been honored, thus the default in the payments.

It is the finding of this Court that the Defendants have violated the agreement and Stipulation by not paying the State of Ohio the sums of money due under the Judgment Decree.

Considering the second alleged violation with regard to the removal and disposal of the waste materials, the

Court heard evidence from the State showing that from the inventory as initially furnished, with the tallying of additional incoming and outgoing material, that there was very little change, if any, in the beginning inventory of July 19th, 1979 and that of November 19, 1979 and January 22, 1980. Evidence offered by the defendants indicated that the original estimates of inventory were nothing more than "guesstimates" and were not accurate. Additional estimates were offered in the form of pictures, (see exhibits) showing that materials were removed. The State claims that the inventory areas merely reflect removal from one area to another area or that the drums were piled higher in order to clear a specific location.

The Court would find that with regard to the alleged violations with regard to the disposal and removal of the waste material, that there has likewise been a gross abuse by the Defendants of not properly recording the initial inventory and the allowance of additional disposal material (objectionable waste) to enter the premises and the continued operation of the business was a flagrant disregard of the Stipulation and Judgment Decree.

Having found the Defendants in violation of both phases of this Stipulation and Judgment Entry, the Court is faced with the serious matter or question as to whether a Receiver should be appointed under Section 2735.01 of the Revised Code to carry out the July 18th, 1979 entry.

Mr. William Kovacs, as the evidence that was initially heard by this Court in 1976 and again reiterated throughout this proceeding, is indeed an entrepreneur, hard working, and a believer in the free enterprise system. His efforts have produced several corporations that

furnish a service to a great number of other corporations in the removal and disposal of corporate waste. These endeavors have apparently been quite profitable and the corporate empires he has built deals in large sums of money. The chemical engineering expertise of Mr. Kovacs is likewise a great factor in the disposal of the various chemical waste with which his companies are intricately involved. Counsel for the Defendant has reminded the Court that "Receivership is Dictatorship" and would take away from Defendant Kovacs his right to deal in his corporate capacity with that subject matter which he had devoted all of his time and his life.

The Court in disposing of the issue of Receivership would note the differences between the type of business in which the respective Defendants are involved and that of the ordinary private corporation or enterprise. The Court would note that the Defendants in this case are engaged in a business that definitely affects this entire community and conceivably the water for this entire area as well as the wild life, natural resources of the area, and the fish in the streams. Mr. Kovacs is engaged in businesses that very definitely have a wide spread effect on community life and its daily operation and is affected with a public interest which invokes the equity powers of the Court.

This Court has found that the defendants have failed in their agreement to cooperate with the Environmental Protection Agencies and have likewise failed to pay to the State of Ohio money which they have acknowledged due for the killing of wild life, the pollution of the local streams and the killing of fish.

This Court would further feel that proper supervision is definitely in order and that the companies owned and operated by the Chem Dyne chain must be supervised and controlled to the extent of the Judgment Entry and Stipulations of July 18th, 1979 and to that end this Court would order that a Receiver be appointed to accomplish what was agreed upon between the parties.

A formal entry may be presented in accordance herewith and the appointment of a Receiver be effected after conference on Monday, February 4th, 1980 at 10:00 a.m.

APPENDIX I

IN THE COURT OF COMMON PLEAS
BUTLER COUNTY, OHIO

STATE OF OHIO, ex rel.
WILLIAM J. BROWN,
ATTORNEY GENERAL OF OHIO,
et al.,

Plaintiffs,

v.

CHEM–DYNE CORPORATION,
et al.,

Defendants.

Case No. CV76-09-0834

JUDGE MARRS

ORDER APPOINTING RECEIVER

Filed Feb. 4, 1980

Having on February 1, 1980, granted plaintiffs' motion for the appointment of a receiver, subject to further order of this court designating a specific reciever and defining the specific authority to be exercised by such receiver,

IT IS HEREBY ORDERED that Mr. Jack Zettler, who is a resident of this state and not a party herein, be appointed receiver of Chem-Dyne Corporation, Spray-Dyne Corporation, Transenvironmental Corporation, K.O.I, Petroleum Company, Inc., Whitco Enterprises, Inc., B & W Enterprises, Hamilton Industrial

APPENDIX J

RELEVANT PROVISIONS OF THE BANKRUPTCY REFORM ACT OF 1978

11 U.S.C. Section 101

In this title –

• • •

(4) "claim means –

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured;

• • •

(11) "debt" means liability on a claim

11 U.S.C. Section 727

(a) The court shall grant the debtor a discharge, unless–
(1) the debtor is not an individual;
(2) the debtor, with intent to hinder,

delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed–
(A) property of the debtor, within one year before the date of the filing of the petition; or
(B) property of the estate, after the date of the filing of the petition;
(3) the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case;
(4) the debtor knowingly and fraudulently, in or in connection with the case–
(A) made a false oath or account;
(B) presented or used a false claim;
(C) gave, offered, received, or attempted to obtain money, property, or advantage, or a promise of money, property, or advantage, for acting or forbearing to act; or
(D) withheld from an officer of the estate entitled to possession under

this title, any recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs;

(5) the debtor has failed to explain satisfactorily, before determination of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities;

(6) the debtor has refused, in the case–

(A) to obey any lawful order of the court, other than an order to respond to a material question or to testify;

(B) on the ground of privilege against self-incrimination, to respond to a material question approved by the court or to testify, after the debtor has been granted immunity with respect to the matter concerning which such privilege was invoked; or

(C) on a ground other than the property invoked privilege against self-incrimination, to respond to a material question approved by the court or to testify;

(7) the debtor has committed any act specified in paragraph (2), (3), (4), (5), or (6) of this subsection, on or within one year before the date of the filing of the petition, or during the case, in connection with another case concern-

ing an insider;

(8) the debtor has been granted a discharge under this section, under section 1141 of this title,or under section 14, 371 or 476 of the Bankruptcy Act, in a case commenced within six years before the date of the filing of the petition;

(9) the debtor has been granted a discharge under section 1328 of this title, or under section 660 or 661 of the Bankruptcy Act, in a case commenced within six years before the date of the filing of the petition, unless payments under the plan in such case totaled at least–

(A) 100 percent of the allowed unsecured claims in such case; or

(B)(i) 70 percent of such claims; and

(ii) the plan was proposed by the debtor in good faith, and was the debtor's best effort; or

(10) the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter.

(b) Except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter, and any liability on a claim that is determined under section 502 of this title as if such

claim had arisen before the commencement of the case, whether or not a proof of claim based on any such debt or liability is filed under section 501 of this title, and whether or not a claim based on any such debt or liability is allowed under section 502 of this title.

(c)(1) The trustee or a creditor may object to discharge under subsection

(a) of this section.

(2) On request of a party in interest, the court may order the trustee to examine the acts and conduct of the debtor to determine whether a ground exists for denial of discharge.

(d) On request of the trustee or a creditor, and after notice and a hearing, the court shall revoke a discharge granted under subsection (a) of this section if–

(1) such discharge was obtained through the fraud of the debtor, and the requesting party did not know of such fraud until after the granting of such discharge;

(2) the debtor acquired property that is property of the estate, or became entitled to acquire property that would be property of the estate, and knowingly and fraudulently failed to report the acquisition of, or entitlement to, such property, or to deliver or surrender such property to the trustee; or

(3) the debtor committed an act specified in subsection (a)(6) of this section.

(e) The trustee or a creditor may request a revocation of a discharge–

(1) under subsection (d)(1) of this section, within one year after such discharge was granted; or

(2) under subsection (d)(2) or (d)(3) of this section, before the later of–

(A) one year after the granting of such discharge; and

(B) the date the case is closed.

CERTIFICATE OF SERVICE

I certify that three copies of this appendices in support of petition for writ of certiorari were mailed pursuant to Supreme Court Rule 28.3 by United States mail, first-class postage prepaid, this _____ day of December, 1983 to John A. Garretson, 118 S. Second Street, Hamilton, Ohio 45011; to William H. Eder, 900 Tri-State Building, Cincinnati, Ohio 45202; to E. Hanlin Bavely, 604 Tri-State Building, Cincinnati, Ohio 45202.

_____

E. DENNIS MUCHNICKI
Assistant Attorney General
Counsel of Record for Petitioner

AMICUS CURIAE

BRIEF

Office - Supreme Court, U.S.
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CLERK

No. 83-1020

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

IN RE: WILLIAM LEE KOVACS,
Debtor,

and

STATE OF OHIO,
Petitioner-Appellant,

v.

WILLIAM LEE KOVACS, d/b/a B & W ENTERPRISES; HAMILTON INDUSTRIAL REAL ESTATE COMPANY; RESORT RENTALS; and WHITCO ENTERPRISES,
Respondent-Appellee.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF COMMONWEALTH OF PENNSYLVANIA AND TWENTY-NINE STATES AS AMICI CURIAE IN SUPPORT OF REVERSAL

LEROY S. ZIMMERMAN
Attorney General of Pennsylvania
1641 Strawberry Square
Harrisburg, PA 17120
Telephone: (717) 787-3391

HOWARD J. WEIN *
Assistant Counsel
Pennsylvania Department of Environmental Resources
1900 Highland Building
121 South Highland Avenue
Pittsburgh, PA 15206-3988
Telephone: (412) 665-4940

JAMES D. MORRIS
Assistant Counsel
Pennsylvania Department of Environmental Resources
Suite 1200—1315 Walnut Street
Philadelphia, PA 19107
Telephone: (215) 875-7486

* Counsel of Record for *Amici Curiae*

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On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF COMMONWEALTH OF PENNSYLVANIA AND TWENTY-NINE STATES AS AMICI CURIAE

INTEREST OF THE AMICI CURIAE

The *amici curiae* are the Attorneys General of the Commonwealth of Pennsylvania and the states of California, Colorado, Connecticut, Delaware, Idaho, Illinois, Indiana, Kansas, Louisiana, Maine, Michigan, Minnesota, Missouri, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee, Texas, Vermont, Virginia, West Virginia, and Wisconsin, which file this brief pursuant to Rule 36.4 of the Rules of the Supreme

Court of the United States. In each of the *amici*'s states, the governors and the state legislatures have developed or are developing comprehensive statutory and regulatory programs for assuring the public health, safety and welfare and the protection of the environment.[1] The cornerstone of each such program is the right of the sovereign state to institute equitable actions seeking injunctions requiring the abatement of hazards to the public health and safety caused by violators of the various state environmental statutes and regulations.[2] For the second time in this matter,[3] the United States Court of Appeals for the Sixth Circuit has misapplied the Bankruptcy Reform Act of 1978, 11 U.S.C. § 1 *et seq.* ("Bankruptcy Code") striking a devastating blow to *amici* in the exercise of the police power reserved to the various states under the Tenth Amendment of the United States Constitution.

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[1] Pennsylvania's statutes are illustrative of the comprehensive program of environmental protection established by the various states. Each statute is designed to address a particular area of concern. The Act of June 22, 1937, P.L. 1987, 35 P.S. § 691.1 *et seq.* (1982-1983 Supp.) (Pennsylvania Clean Streams Law—Water Pollution); The Act of January 8, 1960, P.L. 2119, as amended, 35 P.S. § 4001 *et seq.* (Pennsylvania Air Pollution Control Act—Air Pollution); The Act of July 7, 1980, P.L. 380, No. 97, 35 P.S. § 6018.101 *et seq.* (1982-1983 Supp.) (Pennsylvania Solid Waste Management Act—Solid Waste); The Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. § 1396.1 *et seq.* (1982-1983 Supp.) (Pennsylvania Surface Mining Conservation and Reclamation Act—Surface Mining); The Act of April 9, 1929, P.L. 177, as amended, 71 P.S. § 510-17 (1982-1983 Supp.) (The Administrative Code of 1929—Abatement of Nuisances).

[2] Illustrative are the provisions in the Pennsylvania statutes, i.e., Section 601 of the Clean Streams Law, *supra*, 35 P.S. § 691.601; Section 10 of the Air Pollution Control Act, *supra*, 35 P.S. § 4010; Sections 603 and 604 of the Solid Waste Management Act, *supra*, 35 P.S. §§ 6018.603 and 6018.604; and Section 18.2 of the Surface Mining Conservation and Reclamation Act, *supra*, 52 P.S. § 1396.20.

[3] See *In Re Kovacs*, 681 F.2d 454 (6th Cir. 1982), vacated and remanded for further consideration, —— U.S. ——, 103 S.Ct. 810 74 L.Ed.2d 1010 (1983).

In *In Re Kovacs*, 681 F.2d 454 (6th Cir. 1982) ("*Kovacs I*"), the Sixth Circuit held that the automatic stay pursuant to Section 362(a) of the Bankruptcy Code, 11 U.S.C. § 362(a), applied so as to preclude the State of Ohio from continuing an action in state court to enforce its police power against an illegal disposer of hazardous waste. This Court granted Ohio's Petition for Certiorari from the Sixth Circuit's decision in *Kovacs I* and on January 25, 1983, vacated the judgment and remanded the case to the United States Court of Appeals for the Sixth Circuit to consider the question of mootness. —— U.S. ——, 103 S.Ct. 810, 74 L.Ed.2d 1010 (1983).

In the instant action, the Sixth Circuit has held that a debtor's obligation to abate the public health hazard posed by the illegal disposal of highly hazardous waste constitutes a claim within the meaning of Section 101(4), 11 U.S.C. § 101(4), of the Bankruptcy Code, so as to constitute a debt within the meaning of Section 101(11), 11 U.S.C. § 101(11), on the part of the debtor which is dischargeable in bankruptcy under Section 727(b) of the Bankruptcy Code, 11 U.S.C. § 727(b). *In Re Kovacs*, 717 F.2d 984 (6th Cir. 1983) ("*Kovacs II*"). In essence, the Sixth Circuit's decision will prevent the *amici* from enforcing state laws concerning environmental protection against violators who have sought the shelter of the Bankruptcy Code, no matter how great the immediate danger to the public health and safety from the violations of those laws. The Sixth Circuit's decision enables violators of state environmental laws to avoid all legal responsibility for the abatement of ongoing public nuisances and health hazards simply through the receipt of a discharge in bankruptcy. The common interest of the *amici* lies in the preservation of their ability to protect the citizenry through enforcement of state police power enactments. They also seek to vindicate the Congressional intent that the Bankruptcy Code not be used to subvert the legitimate interest of the states in seeking the abatement of hazards and nuisances which threaten

the public health, safety and welfare. The *amici* are increasingly concerned that lower federal courts are allowing bankrupts to subvert these important state interests. Lower courts applying *Kovacs I* have imposed the automatic stay to preclude at least two other states and the Federal government from compelling a responsible party to clean up environmental problems that both the states and Congress have determined to be inimical to the public health and welfare. *See Penn Terra Limited v. Department of Environmental Resources*, 24 B.R. 427 (Bank. W.D. Pa. 1982); *United States, et al, and State of New Hampshire, Intervenor v. Johns-Manville Sales Corporation, et al.*, Civil Action No. 81-299-D (District of New Hampshire, Order dated November 15, 1982).[4]

Moreover, in recent years, Congress has also recognized the importance of protecting the same interests served by

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[4] Both *Penn Terra* and *Johns-Manville* are attached as Appendix B to the *Brief of Commonwealth of Pennsylvania and Fourteen States as Amici Curiae* in *In Re Kovacs*, Case No. 82-815, October Term 1982. *Penn Terra*, presently on appeal before the United States Court of Appeals for the Third Circuit (argued December 13, 1982, No. 82-5448) involves the application of the automatic stay provision of the Bankruptcy Code (11 U.S.C. § 362(a)) to a State Court proceeding brought by Pennsylvania to enjoin violations of the Pennsylvania Surface Mining Conservation and Reclamation Act (Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. § 1396.1 *et seq.*) and the Pennsylvania Clean Streams Law (Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. § 691.1 *et seq.*), which arose as a result of unlawful surface mining activities. *Johns-Manville* also involves the application of the automatic stay provision against the Federal Government and the State of New Hampshire in an action brought pursuant to Section 7003 of the Resource Conservation and Recovery Act, 42 U.S.C. § 6973 ("RCRA".) Section 106(a) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9606(a) and the New Hampshire Solid Waste Management Act, RSA 147:45 *et seq.* and the Hazardous Waste Management Act, RSA 147-A (Supp. 1981), to abate violations caused by unlawful hazardous waste disposal activities.

the state police power statutes.[5] The comprehensive regulatory scheme enacted by Congress designed to protect against, *inter alia*, existing and past unlawful hazardous waste disposal activities include provisions for state enforcement of various federally imposed requirements. If the Sixth Circuit's decision is allowed to stand, that scheme could be severely impaired. The *amici* also have an interest in protecting the vitality of the Federal programs and the ability of the states to participate in those programs.

SUMMARY OF ARGUMENT

The Sixth Circuit has erroneously decided that a bankrupt's obligation to comply with state police power enactments constitutes a debt dischargeable in bankruptcy. That decision essentially precludes state environmental enforcement actions pursuant to the police power against debtors in bankruptcy and therefore significantly impairs the power of the states to protect the health, safety and welfare of their citizens. The Sixth Circuit has thus decided incorrectly an important question of federal law. In addition, the reasoning of the Sixth Circuit in this decision is in conflict with the analysis of the Third Circuit Court of Appeals in a case which, like this case, involves the unlawful disposal of hazardous waste. Thus, this case presents an issue which should be decided by this Court.

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[5] *See, e.g.*, the Clean Air Act, 42 U.S.C. § 7401; The Clean Water Act, 42 U.S.C. § 1251; The Resource Conservation and Recovery Act, 42 U.S.C. § 6901; The Federal Surface Mining Control and Reclamation Act, 30 U.S.C. § 1201; The Comprehensive Environmental Response, Compensation and Liability Act (Superfund legislation), 42 U.S.C. § 9601.

ARGUMENT

Because the Sixth Circuit's decision erroneously precludes state environmental enforcement actions against debtors in bankruptcy, and significantly impairs the ability of the states to protect the health, safety and welfare of their citizens, it invites review by this Court.

The Amici are responsible for the regulation of a wide variety of industrial activities. The institution of equity proceedings is one of the primary enforcement tools of any state environmental protection agency in the regulation of such activities because it provides an expeditious, flexible remedy founded upon the scientific expertise and regulatory experience of the agency. If not reversed, the Sixth Circuit's decision will severly impair the ability of the *amici* to regulate effectively toxic waste disposal and other industrial activities which threaten the public health, safety and welfare and injure the environment.

Specifically, under this decision the states will be deprived of their authority to secure the abatement of serious public health hazards whenever such abatement requires affirmative conduct by the bankrupt. This is because the decision of the Sixth Circuit is so broad in its construction of the notion of dischargeability under Section 727(b) of the Bankruptcy Code, *supra*, that under its terms of the federal bankruptcy courts can discharge the bankrupts' obligations to comply with valid state court injunctions even though these are necessary exercises of the state's police power, one of the least limitable of all governmental powers. *Queenside Hills Realty v. Saxl*, 328 U.S. 80 (1946). For example, if toxic waste discharges resulting from a bankrupt's activities pollute a public or private water supply, the *amici* will be without power to require the treatment of the discharge or the replacement of a water supply by the bankrupt polluter, simply because the bankrupt polluter can obtain a discharge of his obligation to the state. The Sixth Circuit's decision will therefore effectively chill enforcement action

by the *amici*, who will be forced to refrain from instituting appropriate enforcement or remedial actions, even in cases involving immediate and serious threats to the public health and safety.

The Sixth Circuit has elevated the interests of the bankrupt debtor, including admitted wrongdoers, above that of the public, contrary to the clear intent of Congress.* Unless reversed, the decision of the Sixth Circuit means that the protection of the health and safety of the public and the preservation of natural resources through any enforcement proceeding to compel compliance will be subjugated entirely to the advantage of the private interests of the bankrupt debtor.

Ohio points out in its Petition for Certiorari at pages 12-19 that the definition of claim, as ultimately adopted by Congress, did not include within it the nature of equitable

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*The implicit view of the Congress was that state police power actions seeking injunctions were not cognizable claims in bankruptcy, and hence entitled to exemption from the automatic stay. See Senate Report No. 95-989 at p. 51; House Report No. 95-595 at pp. 174-175 which states as follows:

> *Under present law, there has been some overuse of the stay in the area of governmental regulation. For example, in one Texas bankruptcy court, the stay was applied to prevent the State of Maine from closing down one of the debtor's plants that was polluting a Maine river in violation of Maine's environmental protection laws.* In a Montana case, the stay was applied to prevent Nevada from obtaining an injunction against a principal in a corporation who was acting in violation of Nevada's anti-fraud consumer protection laws. *The bill excepts these kinds of actions from the automatic stay. The States will be able to enforce their police and regulatory powers free from the automatic stay. The bankruptcy court has ample additional power to prevent damage to the bankrupt estate by such actions on a case-by-case basis. By exempting these State actions from the scope of the automatic stay, the court will be required to examine the State actions more carefully, and with a view to protecting the legitimate interests of the State as well as of the estate, before it may enjoin actions against the debtor or the estate.* (Emphasis supplied; footnotes omitted)

relief sought by Ohio in the state court proceeding. Where an equitable remedy is involved, a "claim" that gives rise to a dischargeable "debt" consists of (1) the right to an equitable remedy for a (2) *breach of performance* if such right gives rise to (3) *a right to payment* . . . 11 U.S.C. § 101(4)(B). In a recent article published in the American Bankruptcy Law Journal (the Quarterly Journal of the National Conference of Bankruptcy Judges), the scope of claims under the Bankruptcy Code was analyzed.[1] The author, Timothy B. Matthews, thoughtfully analyzes at great length those "rights" which constitute claims and conversely those "rights" which constitute a class of "non-claims". Matthews concludes that a "right" such as the one held by the State of Ohio against the debtor Kovacs falls within the class of nonclaims, thus not subject to discharge. In reviewing Section 101(4)(B), Matthews notes at p. 242:

> In examining subsection (B), one notices that two special conditions must hold before a right to an equitable remedy may be considered a claim. *First, the right must arise from a breach of performance. Second, the breach must give rise to a right of payment. If an equitable remedy fails to meet either or both of these conditions, the right to that remedy constitutes a nonclaim. Hence, a right is a nonclaim if and only if it is*
>
> (1) a right to an equitable remedy for breach of performance, where the breach does not give rise to a right to payment (Type "X" nonclaim); or
>
> (2) *a right to an equitable remedy for some reason other than breach of performance, where that reason does not give rise to a right of payment* (Type "Y" nonclaim); or

[1] Matthews, The Scope of Claims Under the Bankruptcy Code, 57 *American Bankruptcy Law Journal*, Summer 1983, pp. 221-244 (First Installment) and 57 *American Bankruptcy Law Journal*, Fall 1983, pp. 329-383 (Second Installment).

> (3) a right to a (nonpayment) equitable remedy for some reason other than breach of performance where that reason does give rise to a right to payment (Type "Z" nonclaim).
>
> (Emphasis supplied) [Matthews, *supra* at p. 242.]

The second category above, the type "Y" nonclaim, is the type of right that the State of Ohio has against Kovacs in the present case. Matthews concludes that this type of claim clearly falls outside the statutory definition of "claim":

> A second kind of nonclaim exists when someone holds a right to an equitable remedy, other than for breach of performance, but no right to payment (as depicted in Figure 2 by the shaded area "Y"). This kind of nonclaim, conveniently labelled *Type "Y"*, is relatively uninteresting because it falls so clearly outside the statutory definition, failing under subsection (B) since the basis for the equitable right is not a breach of performance. *This type of nonclaim includes certain statutory rights whereby an aggrieved party may seek an equitable remedy such as injunctive relief but has no right to damages.*
>
> • • • •
>
> The class of Type Y nonclaims would probably create more interest if the phrase "breach of performance" were interpreted expansively to include all kinds of breaches of duty. One would then be hard-pressed to find any Type Y nonclaim. Every right to an equitable remedy is, in some sense, created because of another person's "breach of duty." *The ultimate scope of Type Y nonclaims will thus depend on how the phrase "breach of performance" is interpreted.* (Emphasis supplied) [Matthews, *supra*, at 244, 245]

The term "breach of performance" can not and ought not be so broadly applied as to encompass Kovac's actions in the instant matter. Matthews continues:

There is an important distinction between these statutory duties and contractual duties generally. In the situation where a party materially breaches a private contract, the innocent party is entitled to treat the contract as at an end and sue for the damages caused. In contrast, statutory duties are not necessarily susceptible of liquidation and often impose continuing obligations on a party. For example, a right to money damages for employment discrimination under the Civil Rights Act of 1964 is a subsection (A) claim and subject to liquidation and discharge. A right to injunctive relief under the Act, however, even if considered a subsection (B) claim, would not be discharged to the extent that the wrong continued after the date of the bankruptcy petition.

• • • •

Where statutes impose continuing obligations on a party, those obligations do not cease when the party seeks bankruptcy relief and it is thus unnecessary to classify the equitable rights to the fulfillment of those obligations as claims under subsection (B).

The case of a continuing statutory obligation (such as to refrain from polluting a stream) should be contrasted with the case of a continuing contractual obligation (such as to refrain from competing against a former employer). Insofar as the "fresh start" purpose of the Bankruptcy Act is concerned, one might argue that a bankrupt chemical company would be better off if, in the future, it did not have to adhere to antipollution laws. The strong public interest in applying the law generally, however, is sufficient to justify applying the law to a rehabilitated chemical company. There is no similar interest in requiring the employee to refrain from competing against his former employer after the employee has gone through bankruptcy. Thus, the right of an employer to enjoin the employee from competing is properly a dischargeable claim under subsection (B). In contrast, there is neither a "fresh start" purpose nor a distributional rationale (as noted in the preceding

paragraph) for classifying a party's right to enjoin the chemical company from polluting as a claim under subsection (B). If there were such a rationale, then it might be appropriate to consider a breach of the statutory obligation as a breach of performance. [Matthews, *supra*, at pp. 850-851.]

The *amici* submit that a breach of "duty" rather than of "performance" exists in this case that removes the underlying Ohio state court proceeding from the definition of claim under Section 101(4)(B) of the Bankruptcy Code.

The Sixth Circuit also erred when it concluded that the breach actually gave rise to a right to payment within the meaning of the Bankruptcy Code. The Court's flawed analysis would lead one to conclude that Mr. Kovacs, by paying off the state some sum of money, could continue to escape his obligation to clean up a public nuisance and health hazard against which Ohio had initially instituted an action in equity to obtain injunctive relief. In Pennsylvania, as well as numerous other jurisdictions, a party cannot obtain the right to pollute or continue to cause a public nuisance.* Following the reasoning of the Sixth Circuit, a debtor who has seriously degraded the environment and threatened the public health by dumping hazardous waste can acquire—for the price of a Petition for Relief—the right to maintain that dangerous public nuisance until the end of time. Clearly, the object of a "fresh start" for Kovacs must not come at the expense of the citizens of Hamilton, Ohio.

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*Com. v. *Barnes & Tucker Company*, 455 Pa. 392, 319 A.2d 871 (1974); *Freitas v. City of Atwater*, 196 C.A.2d 280, 16 Cal. Rptr. 297 (1961); *People v. Perez*, 192 Colo. 362, 561 P.2d 7 (1977); *Midwest Investment Company v. City of Chariton*, 248 Iowa 497, 80 N.W.2d 906, 908 (1957); *Lillier v. State Highway Administration*, 25 Md. App. 276, 33 A.2d 644 (1975); *State ex rel. Board of Health of Saddlebrook Township v. Sommers Rendering Company*, 66 N.J. Super. 334, 169 A.2d 146 (1961). 66 *Corpus Juris Secundum* Nuisances § 91: "There is no such thing as a prescriptive right to maintain a public nuisance."

The Sixth Circuit has erroneously decided that a bankrupt's obligation to comply with state police power enactments constitutes a "debt" dischargeable in bankruptcy, and has thus decided incorrectly an important question of federal law which has not been, but should be, decided by this Court. In conflict with the Third Circuit Court of Appeals, the Sixth Circuit has permitted a discharge in bankruptcy to the debtor Kovacs with respect to all of his obligations under Ohio's police power enactments to abate the hazards to the public health, safety and welfare which he caused through the illegal disposal of hazardous waste.*

In *United States v. Price*, 688 F.2d 204 (3rd Cir. 1982), the court reviewed the denial of a mandatory preliminary injunction sought by the United States to, *inter alia*, engage a study to discover the scope of a severe environmental problem caused by the unlawful disposal of hazardous wastes at a landfill in New Jersey near the source of water for the residents of Atlantic City. The court, while it held that the lower court did not abuse its discretion in denying the injunction, observed:

> We do not agree that *Jaffe* ** leads to the conclusion that, in this case, plaintiff's request for an injunction was actually a claim for damages. Damages

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* There is no question that the Debtor Kovacs is under an absolute obligation to comply with state police power enactments. Section 959(b) of Title 28 of the United States Code provides in pertinent part that:

> . . . a trustee, receiver or manager appointed in any cause pending in any court of the United States, including a debtor in possession, shall manage and operate the property in his possession as such trustee, according to the requirements of the valid laws of the state in which the property is situated, in the same manner that the owner or possessor thereof would be bound to do so if in possession thereof.

This Court upheld the applicability of this provision in *Gibbs v. California*, 355 U.S. 43 (1954).

** *Jaffee v. United States*, 592 F.2d 712 (3d Cir. 1979).

> *are awarded as a form of substantial redress. They are intended to compensate a party for an injury suffered or other loss. A request for a diagnostic study of the public health threat posed by the continuing contamination and its abatement is not any sense a form of damages. The funding of a diagnostic study* in the present case, *though it would require monetary payments, would be preventative* rather than compensatory. *The study* is intended to be a *first step* in the remedial process of *abating an existing but growing toxic waste hazard* which left unchecked, will result in even graver future injury, i.e. the contamination of Atlantic City's water supply. (Footnote and emphasis supplied.) [688 F.2d at 212.]

The instant case is one that cries out for the same approach. Neither the Bankruptcy Court nor the Sixth Circuit found that the threat no longer exists. In fact, the threat does exist, and the state court must be permitted to proceed unfettered in the attempt to compel the debtor Kovacs to abate the hazard.

If the Sixth Circuit opinion is allowed to stand, the Ohio court will be unable to carry its proceedings to a conclusion as to Mr. Kovacs to protect the citizens of Hamilton, Ohio. Furthermore, if the Sixth Circuit's opinion is allowed to stand, the discharge pursuant to Section 727(b) will effectively deprive the Ohio court of a power long recognized in the judicial system, the ability to punish for contempt. Should the Ohio court find that Kovacs' acts and omissions with respect to the Stipulation and Judgment Entry and the subsequent court orders, including those occurring prior to Kovacs' institution of bankruptcy proceedings, were contemptuous, the state court would be powerless to protect its authority by punishing for contempt. If the contempt were criminal in nature, the discharge would effectively preclude the court from trying Kovacs criminally for wilful violations of its orders.

CONCLUSION

The Sixth Circuit has erroneously decided that a bankrupt's obligations to comply with state police power enactments constitutes a debt dischargeable in bankruptcy. This decision deals incorrectly with a major question of federal law which should be, but has not been, decided by this Court. This decision also conflicts with recent reasoning by the Third Circuit.

The Sixth Circuit's decision sanctions continuing environmental harm and danger to the people of Ohio, and will frustrate the efforts of the *amici curiae* as they attempt to resolve closely similar cases as they arise in their own states. The Court should rectify this disturbing situation now by agreeing to hear the instant case.

For these reasons, the *amici* respectfully request that this Court grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this matter.

Respectfully submitted,

LEROY S. ZIMMERMAN
Attorney General of Pennsylvania
1641 Strawberry Square
Harrisburg, PA 17120
Telephone: (717) 787-3391

HOWARD J. WEIN *
Assistant Counsel
Pennsylvania Department of
Environmental Resources
1303 Highland Building
121 South Highland Avenue
Pittsburgh, PA 15206-3988
Telephone: (412) 665-4940

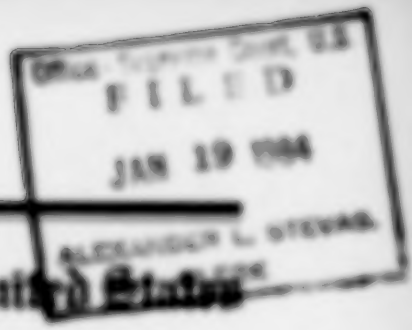
JAMES D. MORRIS
Assistant Counsel
Pennsylvania Department of
Environmental Resources
Suite 1200—1315 Walnut Street
Philadelphia, PA 19107
Telephone: (215) 875-7486

* Counsel of Record for *Amici Curiae*

AMICUS CURIAE

BRIEF

No. 83-1629



In the Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF OHIO, PETITIONER

v.

WILLIAM LEE KOVACS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING PETITIONER

REX E. LEE
Solicitor General

F. HENRY HABICHT, II
Assistant Attorney General

LOUIS F. CLAIBORNE
Deputy Solicitor General

PETER R. STERNLAND, Jr.
DEBE D. SNEE,
WENDY B. JACOBS
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

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No. 83-1020

STATE OF OHIO, PETITIONER

v.

WILLIAM LEE KOVACS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

Like its predecessor, *Kovacs I*,[1] this case presents an important question about the use of the 1978

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[1] As we detail in a moment, in *Kovacs I*, 681 F.2d 454 (6th Cir. 1982), the court of appeals held that the automatic stay provision of the Bankruptcy Code (11 U.S.C. 362) barred enforcement of the same state court injunction involved here, insofar as it required the turn over of assets or income to implement the clean up of the waste disposal site. When the State sought review in this Court, we filed a memorandum supporting the petition (No. 82-815, *Ohio* v. *Kovacs*). On January 24, 1983, the Court granted certiorari, vacated the judgment of the court of appeals, and remanded the case for consideration of mootness. No action has yet been taken on remand. See note 6, *infra*.

Bankruptcy Code to impede the ability of state and federal governments to safeguard public health and safety by enforcing environmental protection statutes. In this instance, the issue is whether a bankrupt defendant may rely on the discharge provisions of the Bankruptcy Code, 11 U.S.C. 524 and 727(b), to void an injunction which requires him to clean up a hazardous waste disposal site.

The problem extends beyond state enforcement actions. It also arises when the United States seeks to enforce cleanup obligations imposed by federal law, including the Clean Water Act, 33 U.S.C. (& Supp. V) 1251 *et seq.*; the Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6901 *et seq.*; the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. (Supp. V) 9601 *et seq.*; the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. (Supp. V) 1201 *et seq.*; and the Clean Air Act, 42 U.S.C. (Supp. V) 7401 *et seq.* Even as it bears on local enforcement efforts, the Sixth Circuit decision implicates the national commitment to a safer environment by encouraging offenders to file for bankruptcy, and thereby excuse themselves from performing orders which require them to abate the health hazards they have created.[2]

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[2] We have cause for concern that both Sixth Circuit decisions in this case may be used to cripple our own environmental enforcement efforts. Already, Kovacs himself has invoked *Kovacs I* to frustrate a federal action pending against him. At least one district court has refused to vacate a stay against an ongoing federal action in pursuit of an injunction that would order the defendant to abate the health hazard created by its disposal of asbestos wastes. *United States* v. *Johns-Manville Sales Corp.*, Bankr. No. 81-299-D (D. N.H. Nov. 15, 1982). *See also In re Penn Terra Ltd.*, 24 Bankr. 427 (W.D. Pa. 1982), relying on the Sixth Circuit decision in *Kovacs I*.

STATEMENT

1. Prior to filing his petition in bankruptcy, the respondent, William Kovacs, had been engaged in the business of industrial waste disposal in Ohio. In 1979, the State of Ohio sued Kovacs as an individual and as the officer of several business entities, including the Chem-Dyne Corporation, for alleged violations of various state environmental laws. At that time, Kovacs signed a stipulation and judgment entry in the Butler County Common Pleas Court (Pet. App. A43-A51). That state court order prohibited him from causing further pollution, required him to remove all hazardous wastes from the premises of the Chem-Dyne Corporation by July 1980, and directed him to pay $75,000 to the Ohio Department of Natural Resources (Pet. App. A46-A47, A48-A50). When Kovacs failed to comply (see Pet. App. A53-A56), the state court appointed a receiver to collect Kovacs' non-exempt assets and use them to finance the cost of cleanup at the Chem-Dyne site (No. 82-815, Pet. App. A27-A38).[3] Subsequently, in July 1980, Kovacs filed a personal petition in bankruptcy in the United States Bankruptcy Court for the Southern District of Ohio. *In re Kovacs*, Bankr. No. B-1-80-1499.[4]

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[3] The receiver was authorized "to receive and collect any and all sums of money due or owing to the defendant business entities or defendant Kovacs in any manner, whether the same are now due or shall hereafter become due and payable" (Pet. App. A3; No. 82-815 Pet. App. A35). The latter reference is to the appendix to the petition for certiorari filed in *Kovacs I*.

[4] His original petition sought reorganization under Chapter 11 of the Bankruptcy Code. In September 1980, the bankruptcy court converted the action to one for straight bankruptcy under Chapter 7 of the Code. See Pet. App. A3.

In an effort to ensure the availability of adequate funds to implement the cleanup order, Ohio sought a state court hearing on Kovacs' current employment status and income. Kovacs thereupon moved the bankruptcy court to enjoin Ohio from proceeding in state court. He argued that the State's goal was to obtain an order permitting the state-court receiver to use his post-bankruptcy income to satisfy the unfilled obligation to clean up the Chem-Dyne site and that such an order would violate the automatic stay provision of 11 U.S.C. 362. The bankruptcy court agreed (No. 82-815 Pet. App. A16-A26).

2. The bankruptcy court readily acknowledged that neither the cleanup order nor the order imposing the receivership gave the State a money judgment with respect to cleaning up the Chem-Dyne premises.* Nonetheless, the bankruptcy court enjoined the State from proceeding in state court "to levy on" Kovacs' post-filing wages (Pet. App. A4). It reasoned that "there is no difference in substance between efforts to collect money from a debtor by securing a court order, and efforts to enforce a money judgment against him * * * [and] therefore, that the State is estopped to deny that it is seeking to enforce a money judgment against debtor" (No. 82-815 Pet. App. A21).

The State appealed to the United States District Court for the Southern District of Ohio, which affirmed. The district court, too, found that the State sought to collect money "just as though it were enforcing a money judgment" (No. 82-815 Pet. App. A13). Accordingly, the district court held the automatic stay applicable "because the state's effort is clearly to enforce a judgment obtained before the filing of the Bankruptcy petition." *Ibid.*

3. The Sixth Circuit affirmed, per curiam (681 F.2d 454 (1982)). The court concluded that, while Section 362(b) clearly permitted governmental units to continue to enforce their police power through mandatory injunctions despite the filing of a bankruptcy petition, it denied them the power to collect money in their enforcement efforts (*id.* at 456). Like the two lower courts, the court of appeals also believed that Ohio had returned to state court in pursuit of what "in essence" amounted to a money judgment against Kovacs, which was "properly" subject to the automatic stay (*ibid.*). Concerned that the state court had ordered Kovacs to release all non-exempt assets, including money payable to himself in the future, the Sixth Circuit could find "little in substance to distinguish that order and a money judgment" (*ibid.*). It concluded that Ohio's attempt to reach Kovacs' post-bankruptcy earnings would "subvert" the purpose of the Bankruptcy Code to rehabilitate debtors (*ibid.*).

4. Subsequently, this Court granted Ohio's petition for certiorari, vacated the judgment, and remanded the case to the Sixth Circuit "to consider the question of mootness" (No. 82-815 (Jan. 24, 1983)). At that time, an appeal was pending in the Sixth Circuit from the lower courts' determination that the state court injunction would be voided by a discharge under the Bankruptcy Code.*

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* The State concedes that it could not enforce that part of the 1979 order requiring Kovacs to pay the State $75,000 (Pet. 5 n.*).

* The present decision of the Sixth Circuit (rendered by a panel different from that in *Kovacs I*) recites that "[t]he panel of [the court of appeals] that considered the automatic stay aspect of the case dealing with 11 U.S.C. Section 362 has

5. On October 20, 1980, the State of Ohio had filed a complaint in the bankruptcy court seeking a declaration that the obligations imposed on Kovacs by the consent decree and the state court injunction —to remove and dispose of industrial and other wastes at the site—could not be discharged in bankruptcy (Pet. App. A29). The State argued that the injunction did not constitute a "claim" or "debt" and thus could not be discharged. See 11 U.S.C. 101(4), 101(11), 524, 727(b).[5] The bankruptcy court extended the reasoning of its earlier decision that the automatic stay prevented the State from enforcing the injunction and held that because Kovacs would have to spend money in order to comply with the injunction, Kovacs "owes plaintiff a debt" which is dischargeable (Pet. App. A22). The court also ruled that only those debts listed within the exemption to the discharge, 11 U.S.C. 523, could survive bankruptcy (Pet. App. A22).

6. The United States District Court for the Southern District of Ohio affirmed (Pet. App. A11-A16). It concluded that "under the law of the case principles, we must accept the determination of the Sixth Circuit that the State was seeking what amounted to a money judgment against Kovacs" (*id.* at A15).[6] Thus, perceiving the State's attempt to enforce the injunction as a request for a monetary payment, the court deemed the request a dischargeable "claim" or "debt" (*ibid.*).

7. The Sixth Circuit again affirmed. 717 F.2d 984 (1983) (Pet. App. A1-A10). That court, like the district court and the bankruptcy court, ruled that efforts to force Kovacs to comply with the cleanup injunction by turning his income over to the court receiver could not be distinguished from an attempt by the State to collect an "alternate right to payment" on a dischargeable "claim" (Pet. App. A9). Though it recognized that there was no law of the case to apply since this Court had vacated the decision in *Kovacs I*, the Sixth Circuit expressly readopted the reasoning in its earlier opinion: "Ohio is essentially seeking to obtain a money payment from Kovacs" (Pet. App. A10). Like the bankruptcy court, the Sixth Circuit suggested that only those debts listed within the Section 523 exemption could survive a discharge (*ibid.*).

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not yet had an opportunity to act on this remand [from the Supreme Court]" (Pet. App. A7 n.5). It seems obvious, however, that the automatic stay question will be moot, as a practical matter, if the present ruling stands, since the underlying obligation will be discharged. On the other hand, if this Court reverses the most recent decision of the Sixth Circuit, the automatic stay, unless vacated by special order, will remain in effect until the bankruptcy proceedings are concluded, thereby inhibiting cleanup operations in the interim. Accordingly, under petitioner's submission, the automatic stay question is not moot. We assume the State has not sought review of *Kovacs I* at this time only because that case is still pending in the court of appeals. Nevertheless, in light of the holdings below that the instant decision is effectively governed by *Kovacs I*, this Court may deem it appropriate, if certiorari is granted here, to direct the parties also to address the automatic stay issue.

[5] The Bankruptcy Code defines "debt" as "liability on a claim" and defines "claim" as either the "right to payment" or the "right to an equitable remedy for breach of performance if such breach gives rise to a right to payment." 11 U.S.C. 101(4), (11).

[6] The district court rendered its ruling on September 17, 1982, before this Court vacated the Sixth Circuit's opinion.

DISCUSSION

The Sixth Circuit's decision effectively releases Kovacs from a mandatory injunction designed to protect public health and safety. At least in principle, its holding conflicts with decisions of other courts, including the Court of Appeals for the Fifth Circuit. By propounding an expansive definition of "money judgment" in *Kovacs* I, and then extending that same faulty approach in *Kovacs* II, the court eviscerated the difference between a dischargeable right to payment for a breach of performance and a non-dischargeable right to enforce an injunction that entails the expenditure of money. The consequence is that a preexisting obligation to clean up a hazardous waste disposal site—incorporated in a final judgment—has been wholly excused.* This holding obviously encourages polluters to abuse the Bankruptcy Code and defy state and federal environmental protection laws. Accordingly, we join Ohio in urging the Court to grant review.

1. To determine whether the cleanup injunction was a "claim" that could be discharged in bankruptcy, the Sixth Circuit bypassed the statutory definition and opted for a simpler test: if the injunction entails the expenditure of money, then it must be a right to payment which is a dischargeable claim. See Pet. App. A9-A10. In fact, the Bankruptcy Code

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* Under the Bankruptcy Code, a discharge "voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under [the Code]." 11 U.S.C. 524(a)(1). Moreover, a discharge "operates as an injunction against the commencement or continuation of an action, the employment of process, or any act, to collect, recover, or offset any such debt * * *." 11 U.S.C. 524(a)(2).

does not define "claim" so sweepingly. Only two classes of rights are dischargeable in bankruptcy: (1) any right to payment, and (2) a right to an equitable remedy for breach of performance *if* such breach itself gives rise to a right to payment. 11 U.S.C. 101(4).** Thus, a mandatory injunction will only be dischargeable *if* the breach may be remedied *either* by an injunction or by a right to payment. Such is not the case here.

The district court acknowledged that the Ohio statutes which authorized the state court to order Kovacs to remove and dispose of the industrial and hazardous wastes did not provide the State with an alternate right to money payment (Pet App. A14-A15). See Pet. 22. The Sixth Circuit made no contrary finding. Instead, the court suggests that the State may pursue other remedies against Kovacs, such as penalties and criminal sanctions. But, of course, penalties and sanctions merely complement orders to abate a threat to public health and safety caused by environmental pollution. Effective public protection depends on the ability of state and federal governments to enforce their respective environmental protection statutes and permits.

2. The court below mistakenly assumed that the significance to Ohio of the consent decree and injunction is that Kovacs "*pay compensation * * * for pecuniary loss*" (Pet. App. A7) (emphasis in original). This approach obliterates the distinction between a money judgment for compensation and an injunction ordering the abatement of a health and safety hazard,

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** *E.g.*, H.R. Rep. 95-595, 95th Cong., 1st Sess. 309 (1977). See generally Matthews, *The Scope of Claims Under the Bankruptcy Code*, 57 Am. Bankr. L. J. 221 (Installment 1) and 339 (Installment 2) (1983).

the performance of which entails the expenditure of funds. Only the latter is at issue here. When the thrust of the government's action is not to collect money damages from the debtor but rather to protect the public health and safety, then the government does not stand in the shoes of an ordinary creditor and the bankrupt's obligation to comply with an order requiring him to abate a health and environmental endangerment may not be voided in bankruptcy.

Many injunctions entail the expenditure of money for their performance. *See United States* v. *Price*, 688 F.2d 204, 213 (3d Cir. 1982). A defendant may be ordered to fund a study to determine the extent of the threat posed by its waste disposal practices, *e.g.*, *Price*; to remove leaking drums of toxic wastes that threaten groundwater contamination, *e.g.*, *Kovacs*; to remove industrial wastes previously deposited in navigable waters, *e.g.*, *United States* v. *Republic Steel Corp.*, 362 U.S. 482, 490-493 (1960); to operate its plant in compliance with environmental regulations, *e.g.*, *Commonwealth* v. *Peggs Run Coal Co.*, 55 Pa. Commw. 312, 423 A.2d 765 (1980). In each case, when the government seeks to enforce the order, its aim is to protect the public health, not to enhance the public fisc.

In the *Price* case, the Third Circuit faulted the district court for adopting an unduly restrictive view of its equitable remedial powers in the context of environmental protection (688 F.2d at 211). The federal government had requested funds to conduct a diagnostic study of the threat posed by a hazardous waste landfill. The district court denied the request, believing it an attempt to transform a claim for damages into an equitable action. The Third Circuit disagreed (*id.* at 212):

> Damages are awarded as a form of substitutional redress. They are intended to compensate a party for an injury suffered or other loss. A request for funds for a diagnostic study of the public health threat posed by the continuing contamination and its abatement is not, in any sense, a traditional form of damages. The funding of a diagnostic study in the present case, though it would require monetary payments, would be preventive rather than compensatory. The study is intended to be the first step in the remedial process of abating an existing but growing toxic hazard which, if left unchecked, will result in even graver future injury, i.e., the contamination of Atlantic City's water supply.[10]

Similarly, in the present case, the state court's orders were preventive, not compensatory. Initially, the court ordered Kovacs himself to clean up the dumpsite. Only subsequently, upon the State's showing that Kovacs had not complied, did the court order Kovacs to release certain assets and future earnings to the court-appointed receiver. Although this latter order directed the payment of money by Kovacs to the receiver, the receivership was established for the limited purpose of implementing the cleanup order. Accordingly, this second order, directed to cleanup of the dumpsite, must be distinguished from a traditional money judgment.[11]

---

[10] For other reasons, the Third Circuit was unable to find that the district court had abused its discretion in denying the preliminary injunction (688 F.2d at 214).

[11] "A money judgment is one which adjudges the payment of a sum of money, as distinguished from one directing an act to be done or property to be transferred or restored. 1 Bouv. Law Dict. p. 2240." *United States Fidelity & Guaranty Co.* v. *Ft. Misery Highway Dist.*, 88 F.2d 969, 972 (9th Cir. 1937).

Remedial orders obtained under the endangerment provisions may require the expenditure of money either directly or indirectly. Nevertheless, such remedial orders do not compensate the government for harm or expenses incurred. Their objective is, rather, to protect the public by assuring compliance with environmental laws. As such, the government's enforcement efforts should not be discharged in bankruptcy.

3. Because the present decision expressly builds on *Kovacs I*, it is relevant to note that the earlier ruling of the Sixth Circuit in this case is at odds with the approach followed by other courts deciding whether governmental enforcement actions fall within an exemption to the automatic bankruptcy stay. 11 U.S.C. 362(b)(4), (5). For example, the Fifth Circuit held an NLRB order that a bankrupt company reinstate two employees whom it had discriminatorily discharged exempt from the bankruptcy stay. *NLRB* v. *Evans Plumbing Co.*, 639 F.2d 291 (5th Cir. 1981) (*per curiam*). Unconcerned by the fact that a reinstatement order was tantamount to an order to commence paying wages, the court ruled that: "The crucial issue is whether the NLRB is a governmental unit and whether this action is one to enforce police or regulatory powers" (639 F.2d at 293).[10]

Similarly, in a case closely analogous to *Kovacs* on its facts, the Commonwealth Court of Pennsylvania found the governmental action exempt from the bankruptcy stay. *Commonwealth* v. *Peggs Run Coal Co.*,

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[10] The court declined to express an opinion as to whether the award of back pay was a money judgment or whether the bankruptcy court had the power to issue a discretionary stay under 11 U.S.C. 105(a), notwithstanding the exemption of the NLRB's action from the automatic stay (639 F.2d at 293 & n.3).

55 Pa. Commw. 312, 423 A.2d 765 (1980). There, the Pennsylvania Department of Environmental Resources sued the owner of a coal mine and cleaning plant for alleged violations of various state environmental statutes. The complaint requested both a mandatory injunction ordering compliance with the laws and the posting of bonds to assure compliance with the injunction. The coal company, having filed a petition in bankruptcy, invoked the automatic stay provision of the Bankruptcy Code to block the agency's action. After analyzing the legislative history, the Pennsylvania court concluded that the agency was not attempting to enforce a money judgment. The court therefore held the proceeding exempt from the automatic stay." 423 A.2d at 767.

4. So, also, on the issue immediately presented by the pending petition, the decision below cannot be reconciled with the decisions of several other courts which have consistently held that a bankrupt defendant's obligation to pay criminal restitution—whether ordered by another court before or after the petition in bankruptcy—survives discharge. *E.g.*, *United States* v. *Corson*, 669 F.2d 216 (5th Cir. 1982); *In re Magnifico*, 7 Collier Bankr. Cas.2d 258 (D. Ariz. July 12, 1982); *In re Newton*, 15 Bankr. 708 (Bankr. W.D. N.Y. 1981). Criminal restitution orders require bankrupt defendants to make payments to persons, the victims, who could not themselves bring civil ac-

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[11] *See also*, *In re Canarico Quarries, Inc.*, 468 F. Supp. 1339 (D. P.R. 1979) (vacating bankruptcy court order that stayed enforcement of Clean Air Act regulations against debtor's quarry operations). But *see United States* v. *Johns-Manville Sales Corp.*, Bankr. No. 81-280-D (D. N.H. Nov. 15, 1982) (refusing to vacate stay against governmental action to obtain a pollution abatement injunction).

tions against the defendants due to the Bankruptcy Code. The courts have uniformly held criminal restitution actions and orders immune from the Bankruptcy Code on the ground that the government's action is undertaken in the public interest, whether it be to protect the public by deterring criminal conduct or to rehabilitate criminal offenders. The analysis focuses on the purpose of the governmental action—not the fact that the resulting order requires a bankrupt to spend money. *Carson*, 669 F.2d at 217; *cf. In re Lare*, 7 Collier Bankr. Cas.2d 394 (D. Md. Sept. 30, 1982) (court refuses to stay criminal prosecution that includes a request for a fine because suit aims to protect public, not simply to obtain payment). The same analysis should have been applied in *Kovacs II*. Here, too, the government's action was undertaken in the public interest to protect public health and safety.

5. Finally, the Sixth Circuit plainly erred in its conclusion that "in the absence of any contention by the State of Ohio in the Bankruptcy Court that the judgment obligation of Kovacs is exempted from discharge under some provision of Section 523, a discharge under Section 727 is warranted" (Pet. App. 10). Whether an order fits within an exemption (11 U.S.C. 523) to the discharge provision is simply irrelevant to the threshold question: whether the order constitutes a "claim." Notably, there is no exemption provided for criminal restitution. Yet, as indicated above, the obligation to make such payments survives discharge. Similarly, the obligation to abate a health and environmental endangerment should survive discharge.

6. The importance of the question raised by the Sixth Circuit decision is obvious. The discharge of

pollution abatement orders like that involved here elevates the Bankruptcy Code over federal and state health and safety laws, thus permitting and encouraging bankruptcy as an escape from the environmental protection laws. Because of the great number of dumpsites urgently requiring cleanup and the limited funds available to state and federal governments for the purpose, any rule that excuses the responsible polluter from performing cleanup work has grave consequences.

The dimensions of the problem and the need for reasonably prompt solutions argue for clarification of the governing law by this Court without delay. In the circumstances, we urge the Court to review the decision below.

CONCLUSION

The petition for a writ of certiorari should be granted.[10]

Respectfully submitted.

REX E. LEE
Solicitor General

F. HENRY HABICHT, II
Assistant Attorney General

LOUIS F. CLAIBORNE
Deputy Solicitor General

PETER R. STEENLAND, JR.
DIRK D. SNEL
WENDY B. JACOBS
Attorneys

JANUARY 1984

[10] See also n.6, *supra*.

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RESPONDENT'S

BRIEF

No. 83-1020

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

In Re: WILLIAM LEE KOVACS,
Debtor,

STATE OF OHIO,
Petitioner-Appellant,

v.

WILLIAM LEE KOVACS, d/b/a, B & W Enterprises; Hamilton Industrial Real Estate Company; Resort Rentals; and Whitco Enterprises,
Respondent-Appellee.

On Writ Of Certiorari To
The United States Court of Appeals
For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

HARRY M. HOFFHEIMER
900 Tri-State Building
Cincinnati, Ohio 45202
Telephone: (513) 852-6023

Counsel of Record for Respondent

WILLIAM H. EDER, JR.
STEVE WILLIAMS
Co-Counsel for Respondent

COURT INDEX PRESS, INC. — 216 E. Ninth Street, Cincinnati, Ohio 45202 — (513) 241-1450

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COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Whether, as a result of the completion of the cleanup of the Chem-Dyne facilities in Hamilton, Ohio, a case or controversy exists between the parties as required by Article III of the Constitution of the United States in order to confer jurisdiction on this Court to grant the Petition for Writ of Certiorari?

2. Whether the court below erred in ruling that the debtor's obligations arising under a state court Stipulation and Judgment Entry were dischargeable in bankruptcy?

COUNTERSTATEMENT OF STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves initially an interpretation of Article III of the Constitution of the United States and a determination of whether a case or controversy exists between the parties at this time so as to provide this Court with jurisdiction to grant the State of Ohio's Petition for Writ of Certiorari. Article III of the Constitution of the United States is set forth in Appendix "A" hereto. Additionally, this case involves an interpretation of 11 U.S.C. § 727 and a determination of whether the Bankruptcy Court erred in ruling that the debtor's obligations under the state court Stipulation and Judgment Entry are dischargeable in bankruptcy. The provisions of 11 U.S.C. § 727 are set forth in Appendix "J" of the Petitioner's Appendices.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. 83-1020

In Re: WILLIAM LEE KOVACS,
Debtor,

STATE OF OHIO,
Petitioner-Appellant,

v.

WILLIAM LEE KOVACS, d/b/a, B & W Enterprises; Hamilton Industrial Real Estate Company; Resort Rentals; and Whitco Enterprises,
Respondent-Appellee.

On Writ Of Certiorari To
The United States Court of Appeals
For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTERSTATEMENT OF THE CASE

More than seven years ago, on September 29, 1976, the State of Ohio filed suit in the Butler County, Ohio Court of Common Pleas, Case No. CV-76-09-0834, alleging that Wil-

liam Lee Kovacs, the debtor, and various business entities, including the Chem-Dyne Corporation, had violated the environmental laws and regulations of Ohio. The debtor, as well as all other parties, executed a Stipulation and Judgment Entry which was filed in that case on July 18, 1979. (Appendix "G" of Petitioner's Appendices). Although that Entry denied liability on behalf of all defendants for any alleged violations of Ohio's environmental laws, it did require the debtor and other defendants to: (1) stop polluting at the Chem-Dyne facilities; (2) cleanup the Chem-Dyne facilities; and (3) pay $75,000 to Ohio's Division of Wildlife.

Arguing that the debtor and other defendants had not complied with the requirements of the July 18, 1979, Stipulation and Judgment Entry, Ohio filed a motion in the state court seeking the appointment of a receiver and, on February 4, 1980, Judge Marrs of the Butler County Common Pleas Court issued an order appointing a receiver over the assets of the debtor and the other defendant business entities associated with him. (Appendix "B" attached hereto.)

That order appointed Jack Zettler as receiver over the assets of the debtor and associated business entities and, *inter alia*, ordered the debtor to turn over to the receiver all of his non-exempt assets. Additionally, the order directed the receiver to take "complete and exclusive control, possession and custody of all assets and property" of the defendants, including Kovacs, and to use those assets as expeditiously as possible in order to effect compliance with the July 18, 1979, Stipulation and Judgment Entry. Further, the order required the debtor and other defendant business entities to cooperate fully with the receiver until he had fulfilled all of his duties as set forth in the appointment order.

On July 17, 1980, William Lee Kovacs, the debtor, filed a petition for reorganization under Chapter 11 of the Bankruptcy Code. After he determined that the cooperation and vote of the governmental environmental agencies would be required in order to have a feasible plan of reorganization approved, and that such cooperation and vote would not be

forthcoming, the debtor filed an application to convert to straight bankruptcy under Chapter 7 of the Bankruptcy Code. An order adjudicating the debtor a bankrupt and directing bankruptcy was entered by the United States Bankruptcy Court, Southern District of Ohio, on September 2, 1980.

On September 12, 1980, Ohio filed a motion in the state court requesting a hearing to determine whether the debtor had additional assets which could be used to pay the receiver a portion of the debtor's post-petition personal earnings for the purpose of effectuating the cleanup of the Chem-Dyne facilities. The debtor then requested a stay of those state court proceedings pursuant to 11 U.S.C. § 362 and that stay was granted by the Bankruptcy Court, which decision subsequently was affirmed by both the United States District Court for the Southern District of Ohio and the Court of Appeals for the Sixth Circuit. Ohio then filed a Petition for Writ of Certiorari with this Court, which vacated the decision and remanded it for further consideration. *State of Ohio* v. *Kovacs*, 681 F.2d 454 (6th Cir. 1982), vacated and remanded for further consideration, — U.S. —, 103 S.Ct. 810 (1983).

On October 20, 1980, Ohio filed a complaint in Bankruptcy Case No. 1-80-01499 seeking an order of the Bankruptcy Court that, *inter alia*, the obligations of the debtor to remove all wastes at the Chem-Dyne facilities were not subject to discharge pursuant to 11 U.S.C. § 727. Rather than arguing that the obligations imposed on the debtor were non-dischargeable as a result of some specific exception to discharge set forth in the Bankruptcy Code, Ohio argued that the obligations imposed on the debtor in the Stipulation and Judgment Entry entered by the state court do not involve claims or debts at all as defined in the Bankruptcy Code, and that only obligations involving debts or claims are dischargeable in bankruptcy.[1]

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[1] In its Petition for Writ of Certiorari, Ohio acknowledges in a footnote on pp. 5-6 that the portion of the Stipulation and Judgment

The debtor and Ohio then executed an agreed stipulation of facts, which was filed in the Bankruptcy Court on July 29, 1981. (Appendix "F" of Petitioner's Appendices.) In September, 1981, Ohio filed a motion for summary judgment requesting an order of the Bankruptcy Court that the obligations imposed on the debtor by the Common Pleas Court were non-dischargeable as a matter of law. The Honorable Burton Perlman, United States Bankruptcy Judge, ruled on February 23, 1982, that the motion for summary judgment should be denied because the obligations at issue were dischargeable in bankruptcy. (Appendix "C" of Petitioner's Appendices.) A final judgment in favor of the debtor was entered on March 30, 1982, and that judgment was affirmed by the United States District Court for the Southern District of Ohio on September 17, 1982. (Appendix "B" of Petitioner's Appendices.) Ohio then appealed to the Court of Appeals for the Sixth Circuit, which affirmed the District Court's opinion on September 22, 1983. It is from that decision (*Ohio ex rel.* v. *Kovacs, et al.*, 717 F.2d 984 (6th Cir. 1983) (Appendix "C" of Petitioner's Appendices)) of the Sixth Circuit that Ohio has filed its Petition for Writ of Certiorari with this Court.

Entry requiring the debtor to pay $75,000 to Ohio's Department of Natural Resources constitutes a money judgment which is dischargeable in bankruptcy. The remaining obligations imposed upon the debtor by the 1979 Stipulation and Judgment Entry, then, are that he not pollute further the premises at Chem-Dyne and that he cleanup the Chem-Dyne facilities.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

1. Since this action began, the surface cleanup of the Chem-Dyne facilities has been completed, with the result that no chemicals, containers, or other items holding chemicals or other wastes currently remain on the Chem-Dyne facilities in Hamilton, Ohio. For that reason, no case or controversy exists between the parties, so that the question on which this petition is based has become moot.

2. No important question of federal law deserving this Court's consideration is presented.

3. No conflict exists between the decision below and other circuits concerning the issue raised in this case.

4. The decision below requires no intervention by this Court in the exercise of its supervisory powers.

I. No Case or Controversy Currently Exists Between the Parties, With the Result That the Instant Case Has Been Rendered Moot.

The underlying court order establishing the obligations of the debtor concerning the cleanup of the Chem-Dyne facilities is the order of the Butler County Court of Common Pleas entered on February 4, 1980, appointing Jack Zettler as a receiver over the assets of the debtor and defendant corporations for the purpose of effectuating the terms of the July, 1979, Stipulation and Judgment Entry. That order, set forth as Appendix "B" hereto, provides that the receiver "is to effect compliance as expeditiously as practicable with all of the orders entered by this Court in its Stipulation and Judgment Entry filed in this case on July 18, 1979 . . ." That order further requires the debtor "to cooperate fully with the receiver in the performance of such duties or the exercise of such powers." In essence, that order requires the receiver to

complete the cleanup of the Chem-Dyne facilities and orders the debtor to cooperate with the receiver in that cleanup.

As outlined by the Affidavit of Kenneth E. Zimmerman, resident engineer, U.S. Corps of Engineers, Huntington District, attached hereto as Appendix "C", the cleanup of the Chem-Dyne facilities has been completed. The notice to proceed on the cleanup contract, Drum, Bulk and Other Waste Removal at Chem-Dyne, Hamilton, Ohio, Contract DACW45-83-C-0164, was forwarded to the contractor on April 27, 1983. Between the date of that notice to proceed and December 22, 1983, OH Materials Company commenced and completed the surface cleanup of all chemicals and other wastes on the Chem-Dyne facilities. Indeed, as evidenced by the Affidavit of Kenneth E. Zimmerman, the total cleanup of the Chem-Dyne facilities was completed as of December 22, 1983, just three days after Ohio filed its Petition for Writ of Certiorari in this case. As of this date, therefore, the cleanup ordered by the Butler County Court of Common Pleas in its entry appointing a receiver over the assets of the debtor and various business entities has been completed.

> The exercise of judicial power under Art. III of the Constitution depends on the existence of a case or controversy. As the Court noted in *North Carolina* v. *Rice*, 404 U.S. 244, 246, 92 S.Ct. 402, 404, 30 L.Ed.2d 413 (1971), a federal court has neither the power to render advisory opinions nor "to decide questions that cannot affect the rights of litigants in the case before them." Its judgments must resolve " 'a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.' " *Ibid.*, quoting *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 241, 57 S.Ct. 461, 646, 81 L.Ed. 617 (1973). As the Court noted last Term, in an opinion of Mr. Justice Brennan, *Steffel* v. *Thompson*, 415 U.S. 452, 459 n. 10, 94 S.Ct. 1209, 1216, 39 L.Ed.2d 505 (1974): "The rule in federal cases is that an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed. *See, e.g., Roe* v. *Wade*, 410 U.S. [113,]. 125, 93 S.Ct. 705, 713, 35 L.Ed.2d 147 [(1973)]; *SEC* v. *Medical Comm. for Human Rights*, 404 U.S. 403, 92 S.Ct. 577, 30 L.Ed.2d 560 (1972); *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 71 S.Ct. 104, 95 L.Ed. 36 (1950)."

Preiser v. *Newkirk*, 422 U.S. 395, 401, 05 S.Ct. 2330, 2334, 45 L.Ed.2d 272 (1975).

Ohio has phrased the issue as whether "the obligation to comply with the injunctions imposed upon Debtor Kovaks by the Butler County Court of Common Pleas to cleanup the Chem-Dyne chemical waste storage site" is dischargeable. (P.3, Petition for Writ of Certiorari.) Specifically, the State of Ohio has alleged since 1980 that "while the cleanup under the receiver's direction was ongoing, there was a need for additional assets to complete the removal and lawful disposal of the hazardous waste materials" at Chem-Dyne (P.7, Petition for Writ of Certiorari.) Any payment made by Kovacs, according to Ohio's argument, is only for the purpose of assisting the cleanup. (P.21, Petition for Writ of Certiorari.)

The debtor's obligation under the order of the state court entered on February 4, 1982, then is to assist the receiver in the cleanup of the Chem-Dyne facilities. Inasmuch as that cleanup has been completed, so that all obligations of the debtor pursuant to that court order have been satisfied, the State of Ohio would be unable to pursue any remedies against the debtor in the event that this Court were to overrule the decision of the Court of Appeals for the Sixth Circuit and hold that the debtor's obligations under the state court decision were non-dischargeable. As a result, there currently is no dispute between the parties concerning the issues at the heart of the decisions below, nor is there any specific relief which could be granted the Petitioner in the instant case.

Respondent respectfully submits additionally that this matter should not be heard under the "capable of repetition yet

evades review" standard. The Respondent is aware of no case which has reached this Court on Petition for Writ of Certiorari where the issue is whether an obligation to cleanup an evironmentally damaged facility is non-dischargeable when, at the time of consideration by this Court, the ordered cleanup already has occurred. Additionally, the record below is silent as to whether the Petitioner has faced this issue in other instances. The facts of this case are so unique that they preclude the Petitioner or other governmental agencies from confronting similar instances in the future. *See Roe* v. *Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147, *reh. denied* 410, U.S. 959, 93 S.Ct. 1409, 35 L.Ed.2d 694 (1973).

The case below has become moot and should be remanded to the court of appeals with directions to vacate the judgments of the district court and bankruptcy court and to remand the case for dismissal in accordance with this Court's decision in *Great Western Sugar Co.* v. *Nelson*, 442 U.S. 92, 99 S.Ct. 2149, 60 L.Ed.2d 735 (1979).

II. No Important Question of Federal Law Deserving this Court's Consideration is Presented by the Decision Below.

Ohio urges this Court to view this case as one involving the ability of governmental units, whether federal, state or local, "to protect citizens from the dangers presented to their health and safety by illegally operated chemical waste storage and disposal facilities." (p. 8, Petition for Writ of Certiorari) Respondent respectfully suggests that it is important to recognize at the outset what this case does not involve. Simply stated, this case does not involve any question pertaining to the ability of the federal, state and/or local governments to protect their citizens from the health and safety dangers created by chemical waste storage and disposal facilities. Not only has the cleanup of the Chem-Dyne facilities been completed, so that there remains no health hazard from the

storage of chemical wastes at that location, but it is ludicrous at best to assume that an individual debtor, William Lee Kovacs, personally can remove the thousands of barrels of chemical wastes which Ohio has alleged were located at the Chem-Dyne facilities. Instead, this case involves the efforts of Ohio to collect money from an individual debtor and Ohio's attempt to cloud its efforts to enforce a money judgment by the facade of arguing that it is attempting only to require the assistance of the debtor in cleaning up the Chem-Dyne facilities.

Ohio sets forth its view of the question presented in this case on page 11 of its Petition as follows:

> The particular question presented by this case is whether the obligation to comply with an injunction to abate a threat to public health and safety issued by a state court in an action brought by state officials to enforce state environmental laws may be discharged in bankruptcy.

Respondent respectfully disagrees and, in accordance with the decisions of the Sixth Circuit and district court below, as well as that of the bankruptcy court, believes that the question in reality is whether Ohio's efforts to have the obligations of the debtor under the state court order held non-dischargeable constitute an attempt by Ohio to enforce a money judgment. As the lower courts have held, the debtor's obligations under the state court order are obligations which amount to obligations pursuant to a money judgment, a reality evidenced by the efforts of Ohio to collect monies from the debtor in furtherance of the cleanup of the Chem-Dyne facilities.

Ohio does not argue that the debtor's obligations arising from the state court proceedings are exempted from dischargeability under 11 U.S.C. § 523, but, rather, that the debtor's obligations pursuant to the February 4, 1980, order of the state court appointing the receiver are not "claims" or "debts" within the meaning of 11 U.S.C. §§ 101(4) or

(11) because the debtor's failure to perform those obligations does not give rise to an alternative right to payment. In the next breath, Ohio, while arguing that it has no alternative right to payment from the debtor, seeks to collect monies from Kovacs in order to help pay for the cleanup of Chem-Dyne. Ohio's argument, while novel and imaginative, reveals within its own terms the error of the state's position:

> The basis for the State's position is that there exists no right to payment which may be made by Kovacs or received by the State *as an alternative to performance* of the environmental cleanup mandated by the court. Rather, any expenditure by Kovacs is to *assist in the performance of the hazardous waste cleanup, not as an alternative* to abating the threat to the citizens of Hamilton, Ohio.

Page 21, Petition for Writ of Certiorari.

In furtherance of this unique argument, Ohio spends considerable effort outlining the legislative history of 11 U.S.C. § 101(4) arguing that there is no right to receive payment as a result of any breach by the debtor of his obligations arising under the state court order. Instead, this Court is asked to distinguish payment by the debtor "in lieu of abating the threat to the safety of Hamilton" and payment "to assist in the cleanup" of the Chem-Dyne facilities in Hamilton, Ohio. The error of Ohio's position is set forth succinctly by the Court of Appeals for the Sixth Circuit:

> Ohio futilely seeks support in the legislative history of Section 101(4). As an example of an equitable remedy that would be dischargeable as a claim, Representative Edwards and Senator DeConcini both refer to "a judgment for specific performance [that] may be satisfied by an alternative right to payment in the event that performance is refused." 124 Cong. Rec. H.11090, S. 17406 (1978). Ohio does not suggest that Kovacs is capable of personally cleaning up the environmental damage he may have caused. Ohio claims there is no alternative right to payment, but when Kovacs failed to perform, state law gave a state receiver total control over all Kovacs' assets. Ohio later used state law to try and discover Kovacs' post-petition income and employment status in an apparent attempt to levy on his future earnings. In reality, the only type of performance in which Ohio is now interested is a money payment to effectuate the Chem-Dyne cleanup.

State of Ohio ex rel. v. *Kovacs, et al.*, 717 F.2d 984 (6th Cir. 1983) (p. A-9, Appendices in Support of Petition for Writ of Certiorari).

Although Ohio's Petition contains numerous assertions that the dischargeability of Kovacs' obligations under the state court order will harm the cleanup efforts concerning the Chem-Dyne facilities, both common sense and logic suggest that this is not true, even disregarding the fact that the cleanup has been completed. The only way in which the debtor could satisfy his obligations involving the Chem-Dyne cleanup was for him to pay money. Kovacs could not personally cleanup the Chem-Dyne facilities. As recognized by the Sixth Circuit, "[h]e cannot perform the affirmative obligations properly imposed upon him by the State Court except by paying money or transferring over his own financial resources. The State of Ohio has acknowledged this by its steadfast pursuit of payment as an alternative to personal performance." *Ohio* v. *Kovacs, supra.* (p. A-10, Appendices in Support of Petition for Writ of Certiorari).

Section 101(11) of the Bankruptcy Code defines "debt" as liability on a claim. Section 101(4) of the Bankruptcy Code defines "claim" as the right to payment. Ohio has sought to enforce a money judgment against Kovacs, has sought to receive payment from Kovacs, and continues to seek, through this Petition for Writ of Certiorari, authority to obtain money from the debtor. As such, Ohio is seeking payment from Kovacs in fulfillment of his obligations, which

are, therefore, liabilities on a claim, and thus debts. As such, unless the State can establish non-dischargeability pursuant to a provision of Section 523 of the Bankruptcy Code, Kovacs' obligations arising out of the state court proceeding are dischargeable pursuant to 11 U.S.C. § 727.

III. No Conflict Exists Between the Decision Below and Other Circuits Concerning the Issue of This Case.

Rule 17, Rules of the Supreme Court, emphasizes that a review on Writ of Certiorari is not a matter of right, but is a matter of judicial discretion, and will be granted only when there are special and important reasons for granting the review. Rule 17.1(a) indicates that such considerations justifying review on Writ of Certiorari include those instances in which one federal court of appeals has rendered a decision which conflicts with the decision of another federal court of appeals on the same matter or has decided a federal question so as to conflict with a decision of a state court of last resort. Inasmuch as the issue in this case involves the bankruptcy laws of the United States, there is no issue as to whether there is a conflict between the decision of the Court of Appeals for the Sixth Circuit and any state court of last resort.

Additionally, Ohio's Petition for Writ of Certiorari is conspicuous in its absence of any citation of any case in conflict with *Ohio* v. *Kovacs, supra*. Respondent similarly is aware of no other decision which is in conflict with that of the Sixth Circuit in this matter. As a result, there is no basis for granting the Petition for Writ of Certiorari because there is a conflict between the decision by the Sixth Circuit in *Ohio, ex rel.* v. *Kovacs, et al., supra*, and any other federal court of appeals or any state court of last resort.

IV. The Decision Below Requires No Intervention of This Court in the Exercise of its Supervisory Powers.

The final clause of Rule 17.1(a), Rules of the Supreme Court, provides that a proper reason for granting a Petition for Writ of Certiorari is that a federal court of appeals "has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision." No such basis exists in this case warranting the granting of the Petition for Writ of Certiorari.

Ohio's argument on this point appears to be that the Sixth Circuit re-adopted its rationale for its decision in *State of Ohio* v. *Kovacs*, 681 F.2d 454 (6th Cir. 1982), vacated and remanded for further consideration, — U.S. —, 103 S.Ct. 810 (1983) and that that rationale was vacated by this Court, so that this Court should consider this case on Ohio's Petition for Writ of Certiorari in order to guarantee that the lower court, the Court of Appeals for the Sixth Circuit, adequately considers the statutory history of the dischargeability provisions of the Bankruptcy Code. That argument ignores the fact that the Sixth Circuit expressly acknowledged that, as a result of this Court's previous vacating and remanding of the earlier *Kovacs* decision, the "law of the case" doctrine did not apply. Indeed, the Sixth Circuit stated affirmatively that its decision was based on different reasons from that of the District Court, which had used the law of the case principles. In adopting the rationale of the Sixth Circuit's prior decision involving this Debtor, the Sixth Circuit recognized the reality that Ohio's "linguistic gymnastics" did not change the fact that Ohio was seeking to enforce a money judgment, with the result that the Debtor's obligations pursuant to the decision of the Butler County Court of Common Pleas were dischargeable in bankruptcy absent any evidence by Ohio that the debt was non-dischargeable pursuant to a provision of 11 U.S.C. § 523.

Arguing, as Respondent believes Ohio did in its Petition for Writ of Certiorari, that a decision of a lower court is, in the Petitioner's view, incorrect and, for that reason, deserves this Court's consideration pursuant to its supervisory powers would produce the result that any decision disagreed with by any petitioner would result in this Court's granting of a petition for writ of certiorari. That result is not expected and would make Rule 17, Rules of the Supreme Court, meaningless. In essence, no basis exists in this case for this Court granting the Petition for Writ of Certiorari based on the need of this Court to exercise its supervisory powers.

CONCLUSION

The question on which this petition is based has become moot inasmuch as the cleanup of the Chem-Dyne facilities has been completed. As a result, the Court should vacate the judgment of the Sixth Circuit and remand the case with instructions that the action be dismissed. In the alternative, this Court should not grant the Petition for Writ of Certiorari because the decision below is not in conflict with the decision of any other federal court of appeals on the same matter, nor is there any conflict between the decision below and any state court of last resort, nor is any important question of federal law deserving this Court's consideration presented.

Respectfully submitted,

HARRY M. HOFFHEIMER
900 Tri-State Building
Cincinnati, Ohio 45202
Telephone: (513) 852-6023
Counsel of Record for Respondent

WILLIAM H. EDER, JR.
STEVE WILLIAMS
Co-Counsel for Respondent

COUNTY OF HAMILTON)
) SS:
STATE OF OHIO)

AFFIDAVIT OF SERVICE

I, Steve Williams, an attorney in the office of Messrs. Wood, Lamping, Slutz & Reckman, a member of which, Harry M. Hoffheimer, is counsel of record for William Lee Kovacs, Appellee herein, depose and say that three copies of this brief in opposition to petition for writ of certiorari were mailed pursuant to Supreme Court Rule 28.3 by United States mail, first-class postage prepaid this ..... day of ....., 1984, to Anthony J. Celebrezze, Jr., Attorney General of Ohio, E. Dennis Muchnicki, Assistant Attorney General and Stephen J. Willey, Assistant Attorney General, all at State Office Tower, 30 East Broad Street, 17th Floor, Columbus, Ohio 43215; to John A. Garretson, 118 S. Broad Street, Hamilton, Ohio 45011, and to E. Hanlin Bavely, 604 Tri-State Building, Cincinnati, Ohio 45202.

Steve Williams
Co-Counsel for Respondent

Sworn to before me and subscribed in my presence this ..... day of ....., 1984.

Notary Public

APPENDIX A

CONSTITUTION OF THE UNITED STATES
ARTICLE III.—THE JUDICIARY

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State

where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

APPENDIX B

IN THE COURT OF COMMON PLEAS
BUTLER COUNTY, OHIO

STATE OF OHIO, ex rel.
WILLIAM J. BROWN,
ATTORNEY GENERAL OF OHIO, et al.,
Plaintiffs,

v.

CHEM-DYNE CORPORATION, et al.,
Defendants.

Case No. CV78-09-0534

JUDGE MARRS

ORDER APPOINTING RECEIVER

(Filed February 4, 1980)

Having on February 1, 1980, granted plaintiffs' motion for the appointment of a receiver, subject to further order of this court designating a specific receiver and defining the specific authority to be exercised by such receiver,

IT IS HEREBY ORDERED that Mr. Jack Zettler, who is a resident of this state and not a party herein, be appointed receiver of Chem-Dyne Corporation, Spray-Dyne Corporation, Transenvironmental Corporation, K.O.I. Petroleum Company, Inc., Whitco Enterprises, Inc., B & W Enterprises, Hamilton Industrial Real Estate Company (hereinafter the "business entities"), and of all property or assets, wherever situated,

whether real or personal, tangible or intangible, and all interests, whether legal or equitable, in property or assets, of the aforementioned business entities;

IT IS FURTHER ORDERED that Mr. Jack Zettler be appointed receiver of all property or assets, wherever situated, whether real or personal, tangible or intangible, and all interests, whether legal or equitable, in property or assets, of William Kovacs, except to the extent of any property exempt from the control of a receiver by operation of law;

IT IS FURTHER ORDERED that the receiver shall forthwith file with the clerk of this court a bond in the sum of $200,000 with surety to be approved by this court conditioned that he will faithfully discharge the duties of receiver in this action and obey the orders of the court herein;

IT IS FURTHER ORDERED that until further order of this court the receiver be and hereby is authorized to take and have complete and exclusive control, possession and custody of all assets and property of the defendant business entities and of defendant Kovacs;

IT IS FURTHER ORDERED that each of the defendant business entities and defendant Kovacs and any persons acting under their direction shall upon presentation of a copy of this order deliver to the possession, custody and control of the receiver any and all property or assets in their possession or under their control, and that all persons are enjoined from in any way disturbing the possession, custody, or control of the receiver and from prosecuting any actions which affect the property or assets of the defendant business entities and defendant Kovacs.

IT IS FURTHER ORDERED that the receiver is to effect compliance as expeditiously as practicable with all of the orders entered by this court in its stipulation and judgment entry filed in this case on July 18, 1979, such orders being as follows:

(1) The Defendants and their employees and agents are permanently enjoined and restrained from causing "pollution", as that term is defined in Section 6111.01 (A) of the Revised Code, of "waters of the state", as that term is defined in Section 6111.01(H) of the Revised Code.

(2) The defendants and their employees and agents are permanently enjoined and restrained from causing or allowing the emissions from the facilities at 500 Ford Boulevard of noxious exhalations or noisome or offensive smells which are injurious to the health, comfort and property of individuals and the public.

(3) Within twelve (12) months of the signing of this order the Defendants and their employees and agents are to remove and dispose of all industrial wastes and/or other wastes as described in Finding No. Seven (7) from the premises at 500 Ford Boulevard. The removal is to be accomplished at the rate of a net reduction of 75,000 gallons of liquids and 340 drums of solid and semisolid sludges per month. Compliance with this schedule shall be determined every three (3) months on the basis of the average rate of reduction over the previous three (3) months, except that during the last three (3) months the net rate must proceed at a rate of at least 75,000 gallons of liquid and 340 drums of solid and semisolid sludge in each month.

(4) The Defendants and their employees and agents are to allow the Director of the Ohio Environmental Protection Agency and/or his agents and representatives to conduct a quarterly inventory of industrial wastes and/or other wastes on the premises at 500 Ford Boulevard, and to supply to the director and/or his agents and representatives such additional information as the Director and/or his agents and representatives reasonably determine is necessary in order to assure that the industrial wastes and/or other wastes are being removed and disposed of from the premises at 500 Ford Boulevard at the

rate and in accordance with the schedule established in Order No. Three (3).

(5) The removal and disposal of the industrial wastes and/or other wastes required by Order No. Three (3) shall be performed under the supervision and inspection of the Director of the Environmental Protection Agency and/or his agents and representatives.

(6) The Defendants and their employees and agents shall grant the Director of Ohio EPA and/or his agents and representatives access to enter the premises at 500 Ford Boulevard during normal business hours for the purpose of assuring that the removal and disposal of the wastes contained in Order No. Three (3) is being conducted in accordance with such additional terms and conditions as required by the Director and/or his agents and representatives pursuant to Order No. Four (4) and Order No. Five (5). The Defendants shall grant such access during normal business hours to the director and/or his agents and representatives without the need for a search warrant.

(7) Upon the removal and disposal of all industrial wastes and other wastes as required by Order No. Three (3), the Defendants and their employees and agents are further permanently enjoined, restrained and ordered to refrain from any activity which would cause the importation into the premises at 500 Ford Boulevard, or the generation on the premises at 500 Ford Boulevard, of any industrial or other wastes except those normally incident to the operation of offices and maintenance of trucks and trailers. The Defendants are further permanently enjoined, restrained and ordered to refrain from having any financial, legal, equitable or other interest in any activity which would cause the importation onto the premises at 500 Ford Boulevard or the generation on the premises at 500 Ford Boulevard of any industrial or other wastes except those normally incident to the operation of offices and maintenance of trucks and trailers.

(8) The Defendants shall pay to the Division of Wildlife, Ohio Department of Natural Resources the sum of seventy-five thousand dollars ($75,000) with interest thereon at the rate of six percent (6%) as provided by law. By agreement of the Division of Wildlife and the Defendant, said judgment shall be paid according to the following terms and conditions:

(a) On or before September 1, 1979, the Defendants will pay to the order of the Division of Wildlife the sum of twenty-five thousand dollars ($25,000). Five thousand dollars ($5,000) of said amount shall be paid within seven (7) days of the date of this Entry. The remaining twenty thousand dollars ($20,000) plus six percent (6%) per annum interest shall be paid by September 1, 1979.

(b) In addition, the Defendants will pay to the order of the Division of Wildlife twenty-five (25) consecutive monthly installments, each in the amount of two thousand dollars ($2,000) principal amount, plus interest on the unpaid balance at the rate of six percent (6%) per annum from the date of this Entry, computed as of the date of each payment; the first monthly installment of two thousand dollars ($2,000) plus interest, a total of two thousand, two hundred and fifty dollars ($2,250) shall be payable to the order of the Division of Wildlife on or before October 1, 1979 with subsequent installments due on or before the first day of each month thereafter with the remaining unpaid balance of principal and interest payable on or before October 1, 1981.

(c) In the event that any insurance proceeds are paid to the Defendants under any contract providing liability insurance for the Defendants in settlement of the injuries and damages incurred by the State of Ohio, Division of Wildlife, as referred to above in paragraphs Four (4) and Five (5) of the Findings, such proceeds shall be immediately paid over to the order of the Division of Wildlife, to be credited toward the unpaid balance on the principal amount. The payment of any such

proceeds to the Division of Wildlife shall be in addition to the $25,000 payment referred to in subparagraph (a) above. In the event that any such proceeds paid to the Division of Wildlife are not sufficient to satisfy the entire unpaid balance on the principal amount, then the Defendants shall continue to pay the monthly installments of two thousand dollars ($2,000) plus interest as provided in subparagraph (b) above until the unpaid balance on the principal amount is extinguished.

(d) If the Defendants shall fail to pay any installments of principal or interest, or any part thereof, under this paragraph (8) when it becomes due, the Division of Wildlife shall promptly notify the Defendants of such default and shall afford Defendants ten (10) days after such notification within which to cure the default. If the Defendants default on a payment on more than three occasions, whether the default is cured or not, or if the Defendants fail to correct the default within ten (10) days after the notification provided for herein, then all of the installments and amounts remaining unpaid shall immediately become due and payable in full.

(e) Both principal and interest under the provisions of this paragraph are payable to the order of DIVISION OF WILDLIFE, OHIO DEPARTMENT OF NATURAL RESOURCES, at 1952 Belcher Drive, Building C, Columbus, Ohio 43224, attention: Richard Francis.

(f) The notice from the Division of Wildlife to the Defendants required under subparagraph (d) shall be in writing and shall be by registered or certified mail, postage prepaid, return receipt requested, addressed as follows:

Chem-Dyne Corporation
500 Ford Boulevard
Hamilton, Ohio 45011

Attention: Bruce A. Whitten

Any notice made in accordance with this subparagraph

shall be deemed notice to all and to each of the Defendants.

IT IS FURTHER ORDERED that the receiver is granted the following authority to implement the provisions of this Court's July 18, 1979 stipulation and judgment entry:

1. The receiver shall have authority to direct, manage, and control all activities, operations, and management of those business entities for which a receiver is appointed herein. The receiver shall have authority to carry on the operations of such business entities.

2. The receiver shall have power and authority to make contracts necessary to implement the provisions of the July 18, 1979 judgment entry and to carry on any of the businesses for which the receiver is appointed herein. The receiver shall have power and authority to procure the services of any individual, partnership, corporation, or other organization, association, or entity whenever appropriate, necessary, or helpful to implement the orders of this court.

3. The receiver shall have power and authority to borrow money, execute mortgages or give other security, and buy on credit in the name of any of the business entities for which a receiver is appointed herein.

4. The receiver shall have power and authority to make such payments and disbursements as may be necessary and proper to carry into effect the judgment entry of July 18, 1979, or to carry on the operations of the business entities, including the authority to make payments of debt entitled to priority.

5. The receiver shall have power and authority to receive and collect any and all sums of money due or owing to the defendant business entities or defendant Kovacs in any manner, whether the same are now due or shall hereafter become due and payable, and the receiver shall have power and authority to do such things and enter into such agreements in

connection with the management, care, and preservation of the assets and properties of the defendant business entities and defendant Kovacs as he may deem advisable, and is authorized to incur such expenses and make such disbursements as may in his judgment be advisable or necessary in connection with the care, preservation and maintenance of the properties and assets.

6. The receiver shall have power and authority to issue receivers certificates.

7. The receiver shall have power and authority to institute, prosecute and defend, compromise, adjust, intervene in or become party to such actions or proceedings in state or federal courts as may in his opinion be necessary or proper for the implementation of the terms of the July 18, 1979 judgment entry and of the terms of this order, and likewise to defend, compromise or adjust or otherwise dispose of any and all actions or proceedings instituted against him as receiver or against the defendant business entities and defendant Kovacs, and also to appear in and conduct the defense of any suit or adjust or compromise any actions or proceedings now pending in any court by or against the defendant business entities and defendant Kovacs where such prosecution, defense or other disposition of such actions or proceedings will in the judgment of the receiver be advisable or proper for the implementation of this court's judgment entry of July 18, 1979.

8. Whenever necessary to implement the provisions of the July 18, 1979 judgment entry of this court, the receiver shall have power and authority to sell, lease, or otherwise liquidate or dispose of any assets herein committed to the care and possession of the receiver.

9. The receiver shall have power and authority to petition this court for instructions regarding the exercise of any powers herein provided or duties herein established.

IT IS FURTHER ORDERED that the receivership herein provided shall continue in effect with respect to the defendant business entities and defendant Kovacs until such time as all industrial and/or other wastes, whether solid, liquid, or semi-solid sludge in form, have been removed from the premises at 500 Ford Boulevard, Hamilton, Ohio and properly disposed of in a lawful manner, and until a formal determination by this court that there has been full compliance with all provisions of the July 18, 1979 judgment entry.

IT IS FURTHER ORDERED that each defendant business entity and defendant Kovacs submit to the receiver within fourteen days of the entry of this order appointing a receiver a report listing by item all property and assets of any kind whatsoever, wherever situated, of such Defendant indicating the location of such property or assets conveyed or otherwise transferred by such defendant Kovacs since September, 1979, and identifying the person to whom or the entity to which such properties or assets were transferred and the present location of such properties or assets.

IT IS FURTHER ORDERED that each of the defendant business entities and defendant Kovacs, and all officers, agents, and employees of the defendant business entities and defendant Kovacs, be enjoined and restrained from in any manner interfering with the receiver in the performance of any duties or the exercise of any powers established by the provisions of this order, and that each of the defendant business entities and defendant Kovacs, and all officers, agents, and employees of the Defendant business entities and defendant Kovacs be enjoined and ordered to cooperate fully with the receiver in the performance of such duties or the exercise of such powers.

IT IS FURTHER ORDERED that within thirty days of this appointment the receiver shall submit to the court, with a copy supplied to the parties, a report listing all chemical wastes and other wastes on the premises at 500 Ford Boulevard and containing the receiver's recommendations for the

lawful disposal of such materials. Any materials which the receiver may wish to dispose of prior to the submission of the receiver's report to this court and prior to this court's approval of the recommendations contained therein, shall be disposed of only after the receiver has obtained the approval of the Director of the Ohio Environmental Protection Agency or his representative.

IT IS FURTHER ORDERED that the receiver shall submit to the court a monthly compliance report detailing the receiver's progress in implementing this Court's July 18, 1979 judgment entry in this case.

DATE February 4, 1980

/s/ JUDGE MARRS

APPENDIX C

AFFIDAVIT

The undersigned, Kenneth E. Zimmerman, hereby swears and affirms as follows:

1. That his name is Kenneth E. Zimmerman and that he is employed as Resident Engineer, United States Army Corps of Engineers, Huntington District, 502 8th Street, Huntington, West Virginia 25701;

2. That in such capacity, and in furtherance of his employment, he was the Resident Engineer on behalf of the United States Army Corps of Engineers involved with contract number DACW 45-83-C-0164, Drum Bulk And Other Waste Removal At Chem-Dyne, Hamilton, Ohio;

3. That the notice to proceed on contract number DACW 45-83-C-0164 was issued on April 27, 1983, to O H Materials Company, Division of KBI Corp., 16406 Street, Route 224 East, Findlay, Ohio 45840;

4. That, pursuant to contract number DACW 45-83-C-0164, O H Materials Company was required to complete the total surface cleanup of the Chem-Dyne facilities in Hamilton, Ohio, including the removal of all chemicals, drainage of all containers located on the surface of the Chem-Dyne facilities in Hamilton, Ohio, and removal of all such containers;

5. That, as of December 22, 1983, the total surface cleanup of the Chem-Dyne facilities in Hamilton, Ohio, has been completed and that no chemicals, containers, or other items holding chemicals or other wastes remain on the Chem-Dyne facilities in Hamilton, Ohio as of this date.

6. That the surface cleanup of the Chem-Dyne facilities

has been completed in total and that no surface cleanup of the Chem-Dyne facilities remains to be done.

/s/ Kenneth E. Zimmerman

STATE OF WEST VIRGINIA)
) SS:
COUNTY OF)

Before me, the undersigned, a notary public in and for said county and state personally appeared the above named affiant, and acknowledged the signing of the foregoing Affidavit at his voluntary act and deed.

In Testimony Whereof, I have hereunto subscribed my name and affixed my notarial seal on the 13 day of January, 1984.

/s/ RUTH V. BOTTOMS
Notary Public

REPLY

BRIEF

Office - Supreme Court, U.S.
FILED
FEB 14 1984
ALEXANDER L. STEVAS
CLERK

CASE NO. 83–1020

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

In Re: WILLIAM LEE KOVACS,

Debtor

STATE OF OHIO,

Petitioner-Appellant,

v.

WILLIAM LEE KOVACS, d/b/a, B & W Enterprises; Hamilton Industrial Real Estate Company; Resort Rentals; and Whitco Enterprises,

Respondent-Appellee.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF OF PETITIONER STATE OF OHIO

ANTHONY J. CELEBREZZE, JR.
Attorney General of Ohio

E. DENNIS MUCHNICKI
Assistant Attorney General

State Office Tower
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
(614) 466-2766

COUNSEL OF RECORD
FOR PETITIONER

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ARGUMENT

BECAUSE THERE EXISTS A LIVE DISPUTE BETWEEN OHIO AND KOVACS CONCERNING THE EXTENT OF KOVACS' DUTY UNDER THE STATE COURT ORDERS TO ABATE A CONTINUING ENVIRONMENTAL HAZARD, THIS CASE IS NOT MOOT.

In *Division 1287, Amalgamated Assoc. of Street, Electric Railway and Motor Coach Employees of America v. Missouri*, 374 U.S. 74 (1963), this Court stated that a case is not moot if it is marked by the "presence of an existing unresolved dispute which continues ...." *Id.* at 78. As established by the affidavits of David Strayer and E. Dennis Muchnicki (appended as Exhibits A and B), the case at bar contains "an existing unresolved dispute" between Ohio and Kovacs.

Based upon the affidavit included in his memorandum in opposition to Ohio's Petition, Kovacs argues that the case is moot because all wastes have been removed from the surface of the Chem-Dyne site. The injunction contained in Order No. 3 of the Butler County Court of Common Pleas' July 18, 1979 Stipulation and Judgment Entry (A-46-47), however, is much broader in scope than Kovacs claims. The injunction requires Kovacs to remove *all* hazardous and industrial waste from the site, not merely that which is on the surface of the site. Thus, Strayer's affidavit (Exhibit A, *infra*) is of particular importance.

As established in paragraph 3 of Strayer's affidavit, one of Kovacs' "disposal" techniques which he employed when he had control of the Chem-Dyne site was to take the waste materials which were in the drums and tanks,

pour the material on the ground, and allow it to sink into the soil on the site and ultimately into the groundwater* aquifer system below the site. As a result, much of the material which Kovacs was ordered to remove by the Common Pleas Court's Order of July 18, 1979 still remains on site bound up in the soil and in the groundwater. (Strayer Affidavit, paragraphs 3 and 4). In order to fulfill the requirements of the injunction contained in Order No. Three (3) of the Stipulation and Judgment Entry, *all* the hazardous and industrial waste on the site, including that which is bound up in the soil and groundwater, must be removed. Since the removal of the waste material in the soil and groundwater has not yet been accomplished, the cleanup required by the state court injunction is not completed.

In addition, it is quite clear that Order No. One (1) of the Stipulation and Judgment Entry (see page A-46) has not yet been fulfilled. As indicated in paragraph 4 of Strayer's Affidavit, the percolation of rain and other forms of precipitation through the soil which, due to Kovacs' "disposal" practices is contaminated by the waste he was ordered to remove from the site, has resulted in continuing pollution of "waters of the state" as defined in Ohio Revised Code Section 6111.01(H), i.e., groundwater in and around the site. Therefore, once more, it is clear that the pollution abatement required by the state court's injunctions has not been completely implemented.

Furthermore, while the hazardous and industrial wastes have been removed from the surface of the site,

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* "Groundwater" means the water contained in subsurface water-bearing formations called aquifers.

contrary to the orders of the Common Pleas Court, Kovacs in no way contributed to their removal. Indeed, as found by the state court in its February 1, 1980, opinion on Ohio's motion to impose a receivership (A-52-56), Kovacs acted in "flagrant disregard" of the Common Pleas Court's injunction to remove the hazardous and industrial waste from the site. Instead, Kovacs brought additional waste on the site rather than removing the waste that was already there. Thus, while the wastes which remained on the surface of the site have finally been removed, they were removed through the efforts of the federal, state and local governments, the court receiver and the generators of the waste, not by Kovacs. In addition, the complete removal of waste from the surface by others was not accomplished until December, 1983, rather than by July, 1980, the date the Common Pleas Court had imposed upon Kovacs to complete the removal. As a result, the citizens of Hamilton were exposed to the dangers of the chemicals stored on the surface of Chem-Dyne site for a period of three and one half years longer than tolerated by the state court's order.

Sections 2705.02 and 2705.05 of the Ohio Revised Code establish that the defiance of a court injunction constitutes criminal contempt for which the violator may be imprisoned. While the air of panic and emergency which enveloped Hamilton, Ohio, in late 1979 due to the fires and explosions on the Chem-Dyne site required the State to employ in January, 1980, the remedial measure of receivership rather than the punitive measure of contempt*, the State at no time waived its ability to ultimately hold Kovacs criminally responsible for his wanton contempt of the Common Pleas Court's order.

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* In *Morgan v. McDonough*, 540 F.2d 527, 533 (1st Cir. 1976), *cert. denied*, 429 U.S. 1042 (1977), the court noted that at times the punitive measure of contempt may be inadequate to correct a violation of an injunction and that receivership is a remedial option which may be employed to attempt to implement an injunction.

By the time the State had restored calm to the City by means of successfully beginning the cleanup under the direction of the receiver, however, Kovacs had already obtained the orders from the bankruptcy court which have tied the State's hands and prevented Ohio from bringing Kovacs before the state court to account for his "flagrant disregard" of the court's injunctions. Thus, Kovacs' potential liability for contempt of court remains outstanding regardless of the status of the cleanup of the site.

Therefore, there remain two very live matters of dispute between Ohio and Kovacs: (1) Kovacs' duty under the state court injunction to abate the continuing water pollution by removing the waste material which, due to his dumping practices, now remains on-site bound in the contaminated soil; and (2) Kovacs' liability for his contemptuous, "flagrant disregard" of the Common Pleas Court's injunction to abate all water pollution and to cleanup the Chem-Dyne site. Unfortunately, due to the bankruptcy court's issuance of the statutory stay and determination of dischargeability, Ohio has no ability at this time to return to the state court for resolution of the two disputed matters described above.

Finally, as noted in the affidavit of E. Dennis Muchnicki, attached as Exhibit B, Kovacs has filed no pleading before the Butler County Court of Common Pleas asking for a discharge of the receiver on the grounds that the cleanup of the Chem-Dyne site has been completed. Ohio submits that Kovacs has never filed such a pleading in the state court because Kovacs knows very well that, in light of the on-going serious ground-water contamination, the state court would decide that the cleanup mandated by the July 18, 1979 injunctions has not yet been fully implemented. Rather than having the courtesy to at least place the matter before the state

court, however, Kovacs attempts to have this Court, without the benefit of an evidentiary hearing, determine whether the Common Pleas Court's injunction has been completely implemented. Ohio suggests that basic principles of comity between the state and federal court systems indicate that this Court should decline to review the status of compliance with a state court order when that issue has not been placed before the state court for determination. Thus, until the Common Pleas Court determines that all requirements of its July 18, 1979 Judgment Entry have been fulfilled and discharge of the receiver is therefore appropriate, the issue of the obligations imposed by that court's orders is not moot.

This Court has recognized that a case is not moot when it is:

> [D]efinite and concrete, touching the legal relations of parties having adverse legal interests. *** [And contains] a real and substantial controversy admitting of specific relief through a decree of a conclusive character. . . .

Aetna-Life Insurance Co. v. Haworth, 300 U.S. 227, 240-241 (1937); *North Carolina v. Rice*, 404 U.S. 244, 246 (1971). In this case Ohio and Kovacs clearly have "adverse legal interests". In addition, by granting Ohio relief through a decree reversing the determination of dischargeability and lifting the statutory stay, this Court can provide Ohio with "specific relief through a decree of conclusive character" which would give Ohio the opportunity to return to the state court for a determination of Kovacs' obligations under the orders of the Butler County Common Pleas Court. Thus, there exists a continuing controversy between Ohio and Kovacs which,

pursuant to a decision by this Court reversing the Sixth Circuit, Ohio could place before the state court for resolution. Therefore, this case is not moot.

CONCLUSION

For the reasons provided above, Ohio's petition is not moot and the Court should grant the petition.

Respectfully submitted,

ANTHONY J. CELEBREZZE, JR.
Attorney General of Ohio

E. DENNIS MUCHNICKI
Assistant Attorney General

State Office Tower
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
(614) 466-2766

COUNSEL OF RECORD
FOR PETITIONER

CERTIFICATE OF SERVICE

I certify that three copies of this reply brief of petitioner State of Ohio were mailed pursuant to Supreme Court Rule 28.3 by United States mail, first-class postage prepaid, this 13th day of February to John A. Garretson, 118 S. Second Street, Hamilton, Ohio 45011, Harry M. Hoffheimer, 900 Tri-State Building, Cincinnati, Ohio 45202, E. Hanlin Bavely, 604 Tri-State Building, Cincinnati, Ohio 45202, James D. Morris, Assistant Counsel, Pennsylvania Department of Environmental Resources, Suite 1200, 1315 Walnut Street, Philadelphia, Pennsylvania 19107, The Solicitor General of the United States, United States Department of Justice, Washington, D.C. 20530.

E. DENNIS MUCHNICKI
Assistant Attorney General
Counsel of Record for Petitioner

Exhibit A

AFFIDAVIT OF DAVID STRAYER

COUNTY OF FRANKLIN

STATE OF OHIO

David Strayer being first duly sworn, states as follows:

1. He is employed in the Southwest District Office of the Ohio Environmental Protection Agency in the Division of Hazardous Materials Management.

2. As part of his responsibilities, he is the assigned Chem-Dyne State Site Coordinator. As part of his responsibilities as site coordinator, he is familiar with the operations and status of the site on a daily basis.

3. Among the unlawful disposal techniques employed by William Kovacs and the Chem-Dyne employees working under his direct supervision was to pour drums of hazardous waste on the ground at the Chem-Dyne site and allow the waste to sink into the soil. The net effect is that there are areas of severe soil contamination throughout the Chem-Dyne site.

4. The soil at the Chem-Dyne site is basically a sandy material. As rainfall or other forms of precipitation fall upon the soil and sink into the soil, the water becomes contaminated as it leaches through the soil into the groundwater. As a result, the contaminated soil has itself become a source which is causing continuing groundwater pollution. The aquifer system which is being contaminated is used as a source of drinking water by the City of Hamilton, Ohio.

5. The United States Environmental Protection Agency and the Ohio Environmental Protection Agency jointly are working on a study to determine the extent of groundwater pollution and soil contamination at the site. The study will be used as a basis for determining the extent of soil removal, including the waste material bound into the soil, and groundwater removal which is necessary in order to complete the cleanup of the site.

6. The results of that study are not expected until the summer of 1984. After the study is completed, a decision will be made as to the manner in which the site should be cleaned up. That decision will then have to be implemented. Only after the contaminated soil and groundwater, including the waste materials contained therein, have been removed from the site will the clean-up of the site contemplated by the Common Pleas Court's order of July 18, 1979 be completed.

7. Further affiant sayeth naught.

/s/ David C. Strayer

Sworn before me and subscribed in my presence, this 25th day of January, 1984.

[signature and seal of notary public deleted]

Exhibit B

AFFIDAVIT OF E. DENNIS MUCHNICKI

COUNTY OF FRANKLIN)
) SS:
STATE OF OHIO)

E. Dennis Muchnicki, being first duly sworn, states as follows:

1. He is an Assistant Attorney General in the Environmental Law Section of the Ohio Attorney General's Office.

2. Since September, 1976 he has served as trial counsel in the case *State of Ohio, et al. v. Chem-Dyne Corporation, et al.*, Butler County Common Pleas Court, Case No. CV76-09-0834.

3. No motion has been filed by any party, including Debtor William Kovacs, in that common pleas court case to discharge the receiver who was appointed on February 4, 1980 to implement the Court's July 18, 1979 Order to clean up the Chem-Dyne site. More specifically, no claim has been made before the common pleas court that the site cleanup has been completed and therefore that either the receiver should be discharged because the purpose for which the receiver was appointed has been accomplished or that Mr. Kovacs should be relieved of his duties imposed by the court's prior orders.

4. Further affiant sayeth naught.

/s/ E. Dennis Muchnicki

Sworn to before me and subscribed in my presence, this 6th day of February, 1984.

[signature and seal of notary public deleted]

JOINT

APPENDIX

Ohio - Supreme Court, U.S.
FILED
APR 23 1984
ALEXANDER L. STEVAS,
CLERK

CASE NO. 83-1020

In The
Supreme Court of the United States

OCTOBER TERM, 1983

IN RE: WILLIAM LEE KOVACS,
Debtor,

STATE OF OHIO,
Petitioner,

v.

WILLIAM LEE KOVACS, d/b/a,
B & W ENTERPRISES; HAMILTON
INDUSTRIAL REAL ESTATE COMPANY;
RESORT RENTALS; AND WHITCO ENTERPRISES,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOINT APPENDIX

ANTHONY J. CELEBREZZE, JR.
Attorney General of Ohio

E. DENNIS MUCHNICKI
Assistant Attorney General

HARRY M. HOFFHEIMER
900 Tri-State Building
Cincinnati, Ohio 45202
(513) 852-6023

State Office Tower
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
(614) 466-2766

Counsel for Respondent

Counsel for Petitioner

PETITION FOR CERTIORARI FILED DECEMBER 19, 1983
CERTIORARI GRANTED MARCH 5, 1984

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APPENDIX L

Decision of United States Bankruptcy Court for the Southern District of Ohio, Western Division, *In re William Lee Kovacs (Kovacs II)*, Bankruptcy Case No. 1-80-01499 (October 31, 1980) JA-23

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*Appendices A through H, which were previously submitted as part of the "Appendices In Support of Petition For Writ of Certiorari", have not been reproduced a second time in the Joint Appendix. Rather, as provided in paragraph 2(a) of this Court's "Memorandum Re Printing Joint Appendix," they are incorporated into the Joint Appendix by reference and the parties would kindly direct this Court to the "Appendices In Support of Petition For Writ of Certiorari" as previously filed in this Court on December 19, 1983.

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Affidavit of David Strayer JA-33

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Affidavit of E. Dennis Muchnicki JA-35

APPENDIX O

Affidavit of Kenneth E. Zimmerman JA-36

APPENDIX P

Relevant Provisions of the Bankruptcy Reform Act of 1978

11 U.S.C. Section 101 ..... JA-38
11 U.S.C. Section 106 ..... JA-38
11 U.S.C. Section 362 ..... JA-39
11 U.S.C. Section 727 ..... JA-44

CERTIFICATE OF SERVICE JA-49

APPENDIX I

RELEVANT DOCKET ENTRIES BELOW

1. Adversary Complaint to Determine Non-Dischargeability, Lift Stay Against Plaintiffs, And Restrain Debtor and Interim Trustee, filed by the State of Ohio and Jack Zettler on October 20, 1980, in the United States Bankruptcy Court for the Southern District of Ohio, Western Division, Adversary No. 1-80-0249.

2. Answer of Defendant E. Hanlin Bavely, Interim Trustee, to Complaint to Determine Non-Dischargeability, Lift Stay Against Plaintiffs, And Restrain Debtor and Interim Trustee, filed by Defendant Bavely on October 24, 1980, in the United States Bankruptcy Court for the Southern District of Ohio, Western Division, Adversary No. 1-80-0249.

3. Answer of William Lee Kovacs To Complaint To Determine Non-Dischargeability, Lift Stay Against Plaintiffs, and Restrain Debtor and Interim Trustee, filed by Defendant William Lee Kovacs on October 29, 1980, in the United States Bankruptcy Court for the Southern District of Ohio, Western Division, Adversary No. 1-80-0249.

4. Stipulation of Parties filed on July 29, 1981, in the United States Bankruptcy Court for the Southern District of Ohio, Western Division, Adversary No. 1-80-0249.

5. Plaintiff State of Ohio's Motion for Summary Judgment filed in the United States Bankruptcy

Court for the Southern District of Ohio, Western Division, on September 28, 1981, Adversary No. 1-80-0249.

6. Defendant Debtor's Memorandum In Opposition To Plaintiffs' Motion For Summary Judgment filed by William Lee Kovacs in the United States Bankruptcy Court for the Southern District of Ohio, Western Division, on October 23, 1981, Adversary No. 1-80-0249.

7. Bankruptcy Court's Decision And Order On Plaintiffs' Motion For Summary Judgment entered on February 23, 1982, in the United States Bankruptcy Court for the Southern District of Ohio, Western Division, Adversary No. 1-80-0249.

8. Final Judgment Entry in favor of defendants entered by United States Bankruptcy Court for Southern District of Ohio, Western Division, on March 30, 1982, Adversary No. 1-80-0249.

9. Notice of Appeal To District Court filed by the Plaintiff State of Ohio in the United States Bankruptcy Court for the Southern District of Ohio, Western Division, on April 8, 1982, Adversary No. 1-80-0249.

10. Opinion Affirming Bankruptcy Court's Determination of Dischargeability by Judge Spiegel-The decision of the Bankruptcy Court is affirmed, filed in the United States District Court for the Southern District of Ohio, Western Division, on September 17, 1982, Case No. C-1-82-526.

11. Judgment Entry of the United States District Court for the Southern District of Ohio, Western Division, filed on September 17, 1982, Case No. C-1-82-526.

12. Notice of Appeal by Plaintiff-Appellant State of Ohio to the United States Court of Appeals for the Sixth Circuit filed on October 4, 1982, Case No. C-1-82-526.

13. Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit affirming the Judgment of the District Court filed on September 22, 1983, Case No. 82-3629.

14. Mandate of the United States Court of Appeals for the Sixth Circuit filed and issued on October 14, 1983, Case No. 82-3629.

APPENDIX J

IN THE COURT OF COMMON PLEAS
BUTLER COUNTY, OHIO

STATE OF OHIO, ex rel.
WILLIAM J. BROWN,
ATTORNEY GENERAL OF OHIO,
et al.,
Plaintiffs,

v.

CHEM–DYNE CORPORATION,
et al.,
Defendants.

Case No. CV76-09-0834

JUDGE MARRS

ORDER APPOINTING RECEIVER

Filed Feb. 4, 1980

Having on February 1, 1980, granted plaintiffs' motion for the appointment of a receiver, subject to further order of this court designating a specific receiver and defining the specific authroity to be exercised by such receiver,

IT IS HEREBY ORDERED that Mr. Jack Zettler, who is a resident of this state and not a party herein, be appointed receiver of Chem-Dyne Corporation, Spray-Dyne Corporation, Transenvironmental Corporation, K.O.I. Petroleum Company, Inc., Whitco Enterprises, Inc., B & W Enterprises, Hamilton Industrial

Real Estate Company (hereinafter the "business entities"), and of all property or assets, wherever situated, whether real or personal, tangible or intangible, and all interests, whether legal or equitable, in property or assets, of the aforementioned business entities;

IT IS FURTHER ORDERED that Mr. Jack Zettler be appointed receiver of all property or assets, wherever situated, whether real or personal, tangible or intangible, and all interests, whether legal or equitable, in property or assets, of William Kovacs, except to the extent of any property exempt from the control of a receiver by operation of law;

IT IS FURTHER ORDERED that the receiver shall forthwith file with the clerk of this court a bond in the sum of $200,000 with surety to be approved by this court conditioned that he will faithfully discharge the duties of receiver in this action and obey the orders of the court herein;

IT IS FURTHER ORDERED that until further order of this court the receiver be and hereby is authorized to take and have complete and exclusive control, possession and custody of all assets and property of the defendant business entities and of defendant Kovacs;

IT IS FURTHER ORDERED that each of the defendant business entities and defendant Kovacs and any persons acting under their direction shall upon presentation of a copy of this order deliver to the possession, custody and control of the receiver any and all property or assets in their possession or under their control, and that all persons are enjoined from in any way disturbing the possession, custody, or control of the receiver and

from prosecuting any actions which affect the property or assets of the defendant business entities and defendant Kovacs.

IT IS FURTHER ORDERED that the receiver is to effect compliance as expeditiously as practicable with all of the orders entered by this court in its stipulation and judgment entry filed in this case on July 18, 1979, such orders being as follows:

> (1) The Defendants and their employees and agents are permanently enjoined and restrained from causing "pollution", as that term is defined in Section 6111.01(A) of the Revised Code, of "waters of the state", as that term is defined in Section 6111.01(H) of the Revised Code.

(2) The defendants and their employees and agents are permanently enjoined and restrained from causing or allowing the emissions from the facilities at 500 Ford Boulevard of noxious exhalations or noisome or offensive smells which are injurious to the health, comfort and property of individuals and the public.

(3) Within twelve (12) months of the signing of this order the Defendants and their employees and agents are to remove and dispose of all industrial wastes and/or other wastes as described in Finding No. Seven (7) from the premises at 500 Ford Boulevard. The removal is to be accomplished at the rate of a net reduction of 75,000 gallons of liquids and 340 drums of solid and semisolid sludges per month. Compliance with this schedule shall be determined every three (3) months on the basis of the average rate of reduction over the previous three (3) months, except that during the last three (3) months the net rate must proceed at a rate of at least 75,000 gallons of liquid and 340 drums of solid and semisolid sludge in each month.

(4) The Defendants and their employees and agents are to allow the Director of the Ohio Environmental Protection Agency and/or his agents and representatives to conduct a quarterly inventory of industrial wastes and/or other wastes on the premises at 500 Ford Boulevard, and to supply to the director and/or his agents and representatives such additional information as the Director and/or his agents and representatives reasonably determine is necessary in order to assure that the industrial wastes and/or other wastes are being removed and disposed of from the premises at 500 Ford Boulevard at the rate and in accordance with the schedule established in Order No. Three (3).

(5) The removal and disposal of the industrial wastes and/or other wastes required by Order No. Three (3) shall be performed under the supervision and

inspection of the Director of the Environmental Protection Agency and/or his agents and representatives.

(6) The Defendants and their employees and agents shall grant the Director of Ohio EPA and/or his agents and representatives access to enter the premises at 500 Ford Boulevard during normal business hours for the purpose of assuring that the removal and disposal of the wastes contained in Order No. Three (3) is being conducted in accordance with such additional terms and conditions as required by the Director and/or his agents and representatives pursuant to Order No. Four (4) and Order No. Five (5). The Defendants shall grant such access during normal business hours to the director and/or his agents and representatives without the need for a search warrant.

(7) Upon the removal and disposal of all industrial wastes and other wastes as required by Order No. Three (3), Defendants and their employees and agents are further permanently enjoined, restrained and ordered to refrain from any activity which would cause the importation into the premises at 500 Ford Boulevard, of any industrial or other wastes except those normally incident to the operation of offices and maintenance of trucks and trailers. The Defendants are further permanently enjoined, restrained and ordered to refrain from having any

financial, legal, equitable or other interest in any activity which would cause the importation onto the premises at 500 Ford Boulevard or the generation on the premises at 500 Ford Boulevard of any industrial or other wastes except those normally incident to the operation of offices and maintenance of trucks and trailers.

(8) The Defendants shall pay to the Division of Wildlife, Ohio Department of Natural Resources the sum of seventy-five thousand dollars ($75,000) with interest thereon at the rate of six percent (6%) as provided by law. By agreement of the Division of Wildlife and the Defendant, said judgment shall be paid according to the following terms and conditions:

(a) On or before September 1, 1979, the Defendants will pay to the order of the Division of Wildlife the sum of twenty-five thousand dollars ($25,000). Five thousand dollars ($5,000) of said amount shall be paid within seven (7) days of the date of this Entry. The remaining twenty thousand dollars ($20,000) plus six percent (6%) per annum interest shall be paid by September 1, 1979.

(b) In addition, the Defendants will pay to the order of the Division of Wildlife twenty-five (25) consecutive monthly installments, each in the amount of two thousand dollars ($2,000) principal

amount, plus interest on the unpaid balance at the rate of six percent (6%) per annum from the date of this Entry, computed as of the date of each payment; the first monthly installment of two thousand dollars ($2,000) plus interest, a total of two thousand, two hundred and fifty dollars ($2,250) shall be payable to the order of the Division of Wildlife on or before October 1, 1979 with subsequent installments due on or before the first day of each month thereafter with the remaining unpaid balance of principal and interest payable on or before October 1, 1981.

(c) In the event that any insurance proceeds are paid to the Defendants under any contract providing liability insurance for the Defendants in settlement of the injuries and damages incurred by the State of Ohio, Division of Wildlife, as referred to above in paragraphs Four (4) and Five (5) of the Findings, such proceeds shall be immediately paid over to the order of the Division of Wildlife, to be credited toward the unpaid balance on the principal amount. The payment of any such proceeds to the Division of Wildlife shall be in addition to the $25,000 payment referred to in subparagraph (a) above. In the event that any such proceeds paid to the Division of Wildlife are not sufficient to satisfy the entire unpaid balance on the principal

amount, then the Defendants shall continue to pay the monthly installments of two thousand dollars ($2,000) plus interest as provided in subparagraph (b) above until the unpaid balance on the principal amount is extinguished.

(d) If the Defendants shall fail to pay any installments of principal or interest, or any part thereof, under this paragraph (8) when it becomes due, the Division of Wildlife shall promptly notify the Defendants of such default and shall afford Defendants ten (10) days after such notification within which to cure the default. If the Defendants default on a payment on more than three occasions, whether the default is cured or not, or if the Defendants fail to correct the default within ten (10) days after the notification provided for herein, then all of the installments and amounts remaining unpaid shall immediately become due and payable in full.

(e) Both principal and interest under the provisions of this paragraph are payable to the order of DIVISION OF WILDLIFE, OHIO DEPARTMENT OF NATURAL RESOURCES, at 1952 Belcher Drive, Building C, Columbus, Ohio 43224, attention: Richard Francis;

(f) The notice from the Division of Wildlife to the Defendants required

under subparagraph (d) shall be in writing and shall be by registered or certified mail, postage prepaid, return receipt requested, addressed as follows:

Chem-Dyne Corporation
500 Ford Boulevard
Hamilton, Ohio 45011

Attention: Bruce A. Whitten

Any notice made in accordance with this subparagraph shall be deemed notice to all and to each of the Defendants.

IT IS FURTHER ORDERED that the receiver is granted the following authority to implement the provisions of this Court's July 18, 1979 stipulation and judgment entry:

1. The receiver shall have authority to direct, manage, and control all activities, operations, and management of those business entities for which a receiver is appointed herein. The receiver shall have authority to carry on the operations of such business entities.

2. The receiver shall have power and authority to make contracts necessary to implement the provisions of the July 18, 1979 judgment entry and to carry on any of the businesses for which the receiver is appointed herein. The receiver shall have power and authority to procure the services of any individual, partnership, corporation, or other organization, association, or entity whenever appropriate, necessary, or helpful to implement the orders of this court.

3. The receiver shall have power and authority to borrow money, execute mortgages or give other security, and buy on credit in the name of any of the business entities for which a receiver is appointed herein.

4. The receiver shall have power and authority to make such payments and disbursements as may be necessary and proper to carry into effect the judgment entry of July 18, 1979, or to carry on the operations of the business entities, including the authority to make payments of debt entitled to priority.

5. The receiver shall have power and authority to receive and collect any and all sums of money due or owing to the defendant business entities or defendant Kovacs in any manner, whether the same are now due or shall hereafter become due and payable, and the receiver shall have power and authority to do such things and enter into such agreements in connection with the management, care, and preservation of the assets and properties of the defendant business entities and defendant Kovacs as he may deem advisable, and is authorized to incur such expenses and make such disbursements as may in his judgment be advisable or necessary in connection with the care, preservation and maintenance of the properties and assets.

6. The receiver shall have power and authority to issue receiver's certificates.

7. The receiver shall have power and authority to institute, prosecute and defend, compromise, adjust, intervene in or become party to such actions or proceedings in state or federal courts as may in his opinion be necessary or proper for the implementation of the terms

of the July 18, 1979 judgment entry and of the terms of this order, and likewise to defend, compromise or adjust or otherwise dispose of any and all actions or proceedings instituted against him as receiver or against the defendant business entities and defendant Kovacs, and also to appear in and conduct the defense of any suit or adjust or compromise any actions or proceedings now pending in any court by or against the defendant business entities and defendant Kovacs where such prosecution, defense or other disposition of such actions or proceedings will in the judgment of the receiver be advisable or proper for the implementation of this court's judgment entry of July 18, 1979.

8. Whenever necessary to implement the provisions of the July 18, 1979 judgment entry of this court, the receiver shall have power and authority to sell, lease, or otherwise liquidate or dispose of any assets herein committed to the care and possession of the receiver.

9. The receiver shall have power and authority to petition this court for instructions regarding the exercise of any powers herein provided or duties herein established.

IT IS FURTHER ORDERED that the receivership herein provided shall continue in effect with respect to the defendant business entities and defendant Kovacs until such time as all industrial and/or other wastes, whether solid, liquid, or semi-solid sludge in form, have been removed from the premises at 930 Ford Boulevard, Hamilton, Ohio and properly disposed of in a lawful manner, and until a formal determination by this court that there has been full compliance with all provisions of the July 18, 1979 judgment entry.

IT IS FURTHER ORDERED that each defendant business entity and defendant Kovacs submit to the receiver within fourteen days of the entry of this order appointing a receiver a report listing by item all property and assets of any kind whatsoever, wherever situated, of such Defendant indicating the location of such property or assets conveyed or otherwise transferred by such defendant Kovacs since September, 1979, and identifying the person to whom or the entity to which such properties or assets were transferred and the present location of such properties or assets.

IT IS FURTHER ORDERED that each of the defendant business entities and defendant Kovacs, and all officers, agents, and employees of the defendant business entities and defendant Kovacs, be enjoined and restrained from in any manner interfering with the receiver in the performance of any duties or the exercise of any powers established by the provisions of this order, and that each of the defendant business entities and defendant Kovacs, and all officers, agents, and employees of the Defendant business entities and defendant Kovacs be enjoined and ordered to cooperate fully with the receiver in the performance of such duties or the exercise of such powers.

IT IS FURTHER ORDERED that within thirty days of this appointment the receiver shall submit to the court, with a copy supplied to the parties, a report listing all chemical wastes and other wastes on the premises at 930 Ford Boulevard and containing the receiver's recommendations for the lawful disposal of such materials. Any materials which the receiver may wish to dispose of prior to the submission of the receiver's report to this court and prior to this court's approval of the recommen-

dations contained therein, shall be disposed of only after the receiver has obtained the approval of the Director of the Ohio Environmental Protection Agency or his representative.

IT IS FURTHER ORDERED that the receiver shall submit to the court a monthly compliance report detailing the receiver's progress in implementing this Court's July 18, 1979 judgment entry in this case.

DATE February 4, 1980
/s/ JUDGE MARRS

APPENDIX K

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO

WESTERN DIVISION

IN RE:

WILLIAM LEE KOVACS
dba-B & W Enterprises,
Hamilton Industrial Real
Estate Company, Resort Rentals,
and Whitco Enterprises

Debtor

NO: C-1-81-59
Bankruptcy No. B-1-80-1499

OPINION

Filed Apr. 30, 1981

SPIEGEL, J. :

This is an appeal from a decision of the Bankruptcy Court which held, in effect, that the automatic stay provision of Section 362(a)(2) of the Bankruptcy Code applies to an effort by the State of Ohio to enforce a judgment against the debtor and that the exemption from automatic stay of Section 362(b)(5) does not apply to this case.

In 1979 William Kovacs, along with Chem-Dyne Corporation and another defendant, signed a Stipulation

and Judgment Entry in the Butler County Common Pleas Court which enjoined him from causing pollution and ordered him to remove within twelve months all industrial wastes from the premises of Chem-Dyne Corporation. At that time Kovacs, along with other corporate and non-corporate entities, was engaged in the industrial waste disposal business in Hamilton, Ohio.

In February 1980, because the 1979 order was not being complied with, the Common Pleas Court appointed a receiver of Kovacs' non-exempt property and assets, as well as the property and assets of Chem-Dyne Corporation and other business entities. The Court also ordered the receiver to effect compliance with its 1979 order, including removal and proper disposal of all wastes. In July 1980 Kovacs filed a personal petition under Chapter 11 of the Bankruptcy Code which was converted to a straight bankruptcy under Chapter 7 in September 1980. Soon after this, the debtor moved the Bankruptcy Court for a specific stay order to restrain proceedings brought against him in Common Pleas Court by the State of Ohio for the purpose of obtaining post-petition personal earnings of the debtor to assist in the clean up ordered by the Court in 1979. The Bankruptcy Court granted this motion, and the State's appeal to this Court followed.

Section 362(a)(2) of the Bankruptcy Code, 11 U.S.C. Section 362(a)(2), provides:

> a) Except as provided in subsection b of this section, a petition filed under Section 301, 302, or 303 of this Title operates as a stay, applicable to all entities, of–
>
> • • •

> (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this Title;

The exceptions to this automatic stay are codified in Section 362(b) which provides, in relevant part:

> b) The filing of a petition under Section 301, 302, or 303 of this Title does not operate as a stay–
>
> • • •
>
> (5) under subsection (a)(2) of this section, of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

The state argues that the judgment entered by the Butler County Common Pleas Court arose from the state's regulatory or police power and was not a money judgment but simply enjoined the debtor from polluting or creating a nuisance, and additionally ordered him to clean up the property in question. Further, the state contends that its efforts to enforce this judgment by seeking the debtor's post-petition personal earnings to assist in the mandated clean-up do not constitute enforcement of a money judgment. Therefore, the State of Ohio concludes that its enforcement proceeding is exempted from the automatic stay provisions of Section 362(a)(2) by the provision of section 362(b)(5) cited above.

In resolving this issue the Bankruptcy Court held:

> Neither prior order of the Butler County Common Pleas Court, it is true, gives the state a money judgment with respect to cleaning up the Chem-Dyne premises, but there is no difference in substance between efforts to collect money from a debtor by securing a Court order, and efforts to enforce a money judgment against him. We hold, therefore, that the state is estopped to deny that it is not seeking to enforce a money judgment against debtor.

In Re William Lee Kovacs, No. 1-80-01499 (Bank. Ct. S.D. Ohio, filed October 31, 1980) at 4-5.

Thus, the Bankruptcy Court found that the state was seeking to collect money just as though it were enforcing a money judgment. After a thorough review of the record in this case, including the transcripts of two hearings, we hold this finding of fact not clearly erroneous. (See, *e.g.*, transcript of September 29, 1980 hearing at 11-12). We also agree with the Bankruptcy Court's conclusion that the exemption provision of Section 362 (b)(5) does not apply, but the automatic stay of Section (a)(2) is applicable because the state's effort is clearly to enforce a judgment obtained before the filing of the Bankruptcy petition.

At oral argument, the state contended that the Bankruptcy Court was mistaken in ordering a specific stay under Section 362(a) when the stay under that section is automatic. Instead, the state urged, the Bankruptcy Court should have considered ordering a stay under Section 105, after requiring the debtor to show irreparable harm, likelihood of success on the merits and no adequate remedy at law. We find this contention without merit. The Bankruptcy Court's order for a specific stay merely confirmed the stay which was in effect as a result of the automatic action of Section 362. The record shows that the state instituted proceedings against the debtor after the petition in bankruptcy was filed, without obtaining the Bankruptcy Court's permission (Record of September 29, 1980 hearing, at 13). Thus, it was necessary for the Court to order a specific stay, even though the proceeding theoretically was "automatically" stayed.

In the briefs and on oral argument, there was much discussion of whether the debtor's obligations under the 1979 judgment of the Butler County Common Pleas Court are dischargeable in bankruptcy. However, a determination of this issue is not necessary to the issue before us. Both parties at oral argument agreed that a motion to determine dischargeability is pending in the Bankruptcy Court.

Finally, the Court is somewhat disturbed by its impression that the state is attempting to punish Mr. Kovacs for not complying with the 1979 judgment, and, in the process, is subverting the purpose of the Bankruptcy Code. One of the major goals of the Code is to rehabilitate the debtor and to give him a chance to make a "fresh start" insofar as he has debts which are dischargeable. Until a determination on dischargeability is made by the Bankruptcy Court, the debtor is to be given the benefit of all the rehabilitative provisions of the

Code. There are criminal sanctions which the state may invoke against Mr. Kovacs if he has violated environmental protection laws and regulations. The Bankruptcy Code may not be used as a substitute for such criminal sanctions. If the Bankruptcy Court holds that the state's claim against Mr. Kovacs is nondischargeable, then the state may seek relief from the stay and proceed against him in Common Pleas Court. Also, we note that the state may currently apply for relief from the automatic stay under the provisions of Section 362(d).

Having determined that the proceedings in Butler County Common Pleas Court to obtain the debtor's post-petition personal earnings are automatically stayed under Section 362(a)(2) of the Bankruptcy Code, we hereby AFFIRM the decision of the Bankrupcy Court.

SO ORDERED.

/s/ signature deleted
United States District Judge

APPENDIX L

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

IN RE

WILLIAM LEE KOVACS,
dba/ B & W ENTERPRISES,
HAMILTON COUNTY (sic) INDUSTRIAL
REAL ESTATE COMPANY, RESORT
RENTALS and WHITCO
ENTERPRISES
Debtor.

Bankruptcy Case No. 1-80-01499

DECISION

Filed Oct. 31, 1980

At Cincinnati, in said District, on the 31st day of October, 1980:

On July 18, 1980 debtor herein filed a petition for relief under Chapter 11 of the Bankruptcy Code. On September 2, 1980 on the application of debtor, the case was converted to a liquidating bankruptcy under Chapter 7 of the Bankruptcy Code.

Now before us are three matters for decision. The State of Ohio has filed Motion for Leave to Intervene, and also Motion to Dismiss the Proceeding. Also before us is debtor's Motion for Specific Stay Order. In the last mentioned motion, debtor seeks to restrain proceedings

brought by the State of Ohio in the Butler County Common Pleas Court which are designed to recover from the debtor post-petition personal earnings. A hearing was held on the foregoing matters, at the conclusion of which we ordered that the motion of debtor be granted with respect to a then set hearing date in the Butler County Common Pleas Court, and that any other like proceedings be held in abeyance pending the decision which we here issue.

The trust of both the Motions of the State of Ohio is to oppose any effort by debtor to regain control of the debtor's enterprises which have been placed under the control of a state receiver, (this being the interpretation by the State of the reason that the debtor filed the Chapter 11 proceeding). Such action by the State, however, was mooted upon conversion of the Chapter 11 to a Chapter 7 proceeding. We believe in any case that the controlling issues in these motions are fully dealt with in a consideration of debtor's motion and we therefore proceed to a discussion of it.

The State of Ohio on about September 13, 1980 brought on in the Butler County Common Pleas Court, a Motion for Hearing to Determine Existence of Additional Assets of debtor (hereafter "State's Motion re Assets"). Specifically, the State asked that court to order debtor to appear for a hearing and testimony to elicit information as to his current employment status and income. The State sought that information as a preliminary to requesting an order from that court which would require that part of debtor's current income be applied for a purpose now to be described.

Debtor individually, together with several non-corporate entities and one or more corporate entities, had carried on a business of industrial waste disposal in Hamilton, Ohio. The Environmental Protection Agency of the State of Ohio in the Butler County Common Pleas Court brought an action against debtor and the other entities, asserting that the disposal operation was not conducted in an acceptable way. There ensued two orders by the Butler County Common Pleas Court, one dated July 18, 1979 and the second, February 4, 1980. In the first order , debtor individually and others agreed to conduct a clean up of the premises employed in the industrial waste disposal operation. In the second order, the court appointed a receiver to perform the clean-up obligations of debtor and the others since they had failed to perform them. The purpose, then, for which State's Motion re Assets was brought was to reach debtor's current income, and to apply that money to the clean-up. It is the State's Motion re Assets against which debtor's Motion for Specific Stay Order is directed.

It is necessary for us to look in some detail at the two orders of the Butler County Common Pleas Court since it is upon them that the respective rights of the parties with which we are here concerned are based. We then must determine how these orders are affected by the several subdivisions of 11 U.S.C. Section 362, and decide the question whether the State has any right to an order by any court requiring that a portion of debtor's current earning s be applied to the clean-up.

The first of the two orders is Stipulation and Judgment Entry of July 19, 1979 which named as defendants Whitten, Kovacs, (debtor herein) and Chem-Dyne Corporation. It was signed personally by the debtor. Under

the title "Findings" appear various representations and agreements entered into between the parties to the litigation. The document concludes with a number of orders. Defendants are enjoined from causing "pollution." Defendants are given twelve months within which to remove and dispose of all industrial wastes at the premises. Various subsidiary provisions are included with regard to the manner in which the removal is to be accomplished, and how that shall be supervised. Defendants are to pay to the Division of Wild Life, (sic) Ohio Department of Natural Resources the sum of $75,000.

The second Order was that entered February 4, 1980 where the Butler County Common Pleas Court issued Order Appointing Receiver. That Order appointed Jack Zettler receiver of a number of business entities including Chem-Dyne Corporation, and included all property or assets, real or personal of those business entities. The Order went on to appoint Zettler as receiver of the property or assets of William Kovacs "except to the extent of any property exempt from the control of a receiver by operation of law." Further, the receiver was ordered to effect compliance with the Stipulation and Entry of the Court filed July 18, 1979. The Order states that the receivership shall continue in effect until the wastes had been removed from the premises and disposed of properly.

The State offers considerable authority to support its contention that the obligations imposed upon debtor Kovacs by these two orders are non-dischargeable. Since these obligations are non-dischargeable, says the State, it should be left by the Bankruptcy Court to pursue remedies in furtherance of them. We will assume, but *arguendo* only, in our following discussion that the obligations of the two orders are non-dischargeable.

We turn next to the relevant provisions of 11 U.S.C. Section 362:

> "(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title operates as a stay, applicable to all entities, of- -
>
> • • •
>
> (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;
>
> • • •
>
> (b) The filing of a petition under section 301, 302 or 303 of this title does not operate as a stay- -
>
> • • •
>
> (5) under subsection (a)(2) of this section, of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;. . .".

It is self evident that the action taken by the State in trying to reach current earnings of debtor is stayed by 11 U.S.C. Section 362(a)(2), for it has been the position

of the State throughout the present motion proceedings that the rights which it is here seeking to enforce stem from the prior orders of the Butler County Common Pleas Court. The question presented to us is whether what the State is attempting in State's Motion re Assets is exempted from the automatic stay of Section 362(a)(2) by reason of Section 362(b)(5). We hold that it is not, even though in its express language Section 362(b)(5) says only that enforcement of a money judgment is subject to the Section 362(a)(2) stay, while other enforcement actions obtained by a governmental unit to enforce its regulatory power are excepted from the stay. Neither prior order of the Butler County Common Pleas Court it is true, gives the State a money judgment with respect to cleaning up the Chem-Dyne premises, but there is no difference in substance between efforts to collect money from a debtor by securing a court order, and efforts to enforce a money judgment against him. We hold, therefore, that the State is estopped to deny that it is not seeking to enforce a money judgment against debtor.

In reaching that conclusion, we have looked to the legislative history of the portions of Section 362 under discussion. There we find a legislative intent to draw a line, on the one hand permitting governmental units to enforce their police and regulatory powers by mandatory injunctions, but on the other hand refusing those units the right to collect money in such enforcement efforts. The relevant House and Senate Reports say with respect to Section 362(b)(4) and (5):

> "Paragraph (4) excepts commencement or continuation of actions and proceedings by governmental units to enforce police

> or regulatory powers. Thus, where a governmental unit is suing a debtor to prevent or stop violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws, or attempting to fix damages for violation of such a law, the action or proceeding is not stayed under the automatic stay. Paragraph (5) makes clear that the exception extends to permit an injunction and enforcement of an injunction, and to permit the entry of a money judgment, but does not extend to permit enforcement of a money judgment. Since the assets of the debtor are in the possession and control of the bankruptcy court and since they constitute a fund out of which all creditors are entitled to share, enforcement by a governmental unit of a money judgment would give it preferential treatment to the detriment of all other creditors.
>
> House Report No. 95-595, 95 Cong., 1st Sess. (1977) 342-3; Senate Report No. 95-989, 95th Cong., 2d.Sess. (1978) 51-2.

Of similar import is the following:

> "Section 362(b)(4) indicates that the stay under section 362(a)(1) does not apply to affect the commencement or continuation of an action or proceeding by a govern-

> mental unit to enforce the governmental unit's police or regulatory power. This section is intended to be given a narrow construction in order to permit governmental units to pursue actions to protect the public health and safety and not to apply to actions by a governmental unit to protect a pecuniary interest in property of the debtor or property of the estate."

124 Cong. Rec. H. 11, 092 (Sept. 28, 1978); S 17, 409 (Oct. 6, 1978). See also 2 Collier on Bankruptcy (15th ed.) 362-39. While it is true that the State is trying to collect a portion of debtor's post-filing wages, and not to participate in the bankruptcy estate on a preferred basis, this legislative history is relevant in giving insight into the scope intended by Congress for Section 362(b)(4) and (5). It makes clear a general intent to distinguish injunctive and monetary relief.

The State argues that the law is or should be that the automatic stay of Section 362 does not apply to efforts to enforce non-dischargeable obligations. In support of this position, the State cites cases typified by *Brennan v. T & T Trucking, Inc.*, 396 F. Supp. 615 (D.C. Okla, 1975). Its cases are, however, clearly distinguishable. Firstly, none were decided under 11 U.S.C. Section 362 of the Bankruptcy Code, but rather involved application of Bankruptcy Rule 401 under the predecessor Bankruptcy Act. Secondly, in the case before us the State is seeking monetary relief, while in its cited cases, the question involved efforts by the governmental unit to secure injunctive relief.

In its memorandum in support of Motion To Dismiss, the State of Ohio says:

> "The key to the State's position is the non-dischargeable nature of the obligation imposed upon Kovacs by the July 18, 1979 Stipulation and Judgment Entry. Since it is non-dischargeable Kovacs cannot use a Title 11 proceeding to escape the performance of the duty."

The State suggests that its efforts in the Butler County Common Pleas Court should not or cannot be stayed because the duties of Kovacs arising under the Stipulation and Judgment Entry of July 18, 1979 are non-dischargeable. The State thus brings us to an interface between the stay provisions of the Bankruptcy Code 11 U.S.C. Section 362 and the dischargeability section, 11 U.S.C. Section 523. While we had earlier in our decision accepted for purposes of argument that the State is proceeding on a non-dischargeable obligation, we will not here decide that question on the merits. Bankruptcy Rule 701(7) expressly provides that the determination of the dischargeability of a debt is to be determined in an adversary proceeding. While the State attempts to avoid this point by contending that it is not a claimant, we suggest to the State that, certainly to the extent it desires monetary relief, it maintains that position at its peril. One of the indisputable expansions wrought in the law by the Congress when it enacted the Bankruptcy Code, was in the definition of the word "claim" as found at 11 U.S.C. Section 101(4). In doing so it was the intent of Congress to enhance the "fresh start" given a debtor.

In light of the foregoing discussion we conclude that debtor is correct in his contentions and should prevail on his motion. The State will be stayed from proceeding further in the Butler County Common Pleas Court in attempting to levy on post-filing wages of debtor. Furthermore, since important rights arising under the Bankruptcy laws of the United States are involved, the Motion to Dismiss filed by the State of Ohio will be denied. By this remark it is our intention to dispose of the suggestion of the State of Ohio that this is an appropriate case for abstention. We also deny the State's Motion to Intervene. Intervention is unnecessary to afford to the State of Ohio an opportunity to take those actions in this court which it deems necessary to protect its legitimate rights, particularly since the case has been converted from Chapter 11 to Chapter 7.

/s/ signature deleted
United States Bankruptcy Judge

Exhibit M

AFFIDAVIT OF DAVID STRAYER

COUNTY OF FRANKLIN

STATE OF OHIO

David Strayer, being first duly sworn, states as follows:

1. He is employed in the Southwest District Office of the Ohio Environmental Protection Agency in the Division of Hazardous Materials Management.

2. As part of his responsibilities, he is the assigned Chem-Dyne State Site Coordinator. As part of his responsibilities as site coordinator, he is familiar with the operations and status of the site on a daily basis.

3. Among the unlawful disposal techniques employed by William Kovacs and the Chem-Dyne employees working under his direct supervision was to pour drums of hazardous waste on the ground at the Chem-Dyne site and allow the waste to sink into the soil. The net effect is that there are areas of severe soil contamination throughout the Chem-Dyne site.

4. The soil at the Chem-Dyne site is basically a sandy material. As rainfall or other forms of precipitation fall upon the soil and sink into the soil, the water becomes contaminated as it leaches through the soil into the groundwater. As a result, the contaminated soil has itself become a source which is causing continuing groundwater pollution. The aquifer system which is being contaminated is used as a source of drinking water by the City of Hamilton, Ohio.

5. The United States Environmental Protection Agency and the Ohio Environmental Protection Agency jointly are working on a study to determine the extent of groundwater pollution and soil contamination at the site. The study will be used as a basis for determining the extent of soil removal, including the waste material bound into the soil, and groundwater removal which is necessary in order to complete the cleanup of the site.

6. The results of that study are not expected until the summer of 1984. After the study is completed, a decision will be made as to the manner in which the site should be cleaned up. That decision will then have to be implemented. Only after the contaminated soil and groundwater, including the waste materials contained therein, have been removed from the site will the clean-up of the site contemplated by the Common Pleas Court's order of July 18, 1979 be completed.

7. Further affiant sayeth naught.

/s/ David C. Strayer

Sworn before me and subscribed in my presence, this 25th day of January, 1984.

[signature and seal of notary public deleted]

Exhibit N

AFFIDAVIT OF E. DENNIS MUCHNICKI

COUNTY OF FRANKLIN)
) SS:
STATE OF OHIO)

E. Dennis Muchnicki, being first duly sworn, states as follows:

1. He is an Assistant Attorney General in the Environmental Law Section of the Ohio Attorney General's Office.

2. Since September, 1976 he has served as trial counsel in the case, *State of Ohio, et al., v. Chem-Dyne Corporation, et al.*, Butler County Common Pleas Court, Case No. CV76-09-0834.

3. No motion has been filed by any party, including Debtor William Kovacs, in that common pleas court case to discharge the receiver who was appointed on February 4, 1980 to implement the Court's July 18, 1979 Order to clean up the Chem-Dyne site. More specifically, no claim has been made before the common pleas court that the site cleanup has been completed and therefore that either the receiver should be discharged because the purpose for which the receiver was appointed has been accomplished or that Mr. Kovacs should be relieved of his duties imposed by the court's prior orders.

4. Further affiant sayeth naught.

/s/ E. Dennis Muchnicki

Sworn to before me and subscribed in my presence, this 6th day of February, 1984.

[signature and seal of notary public deleted]

APPENDIX O

AFFIDAVIT

The undersigned, Kenneth E. Zimmerman, hereby swears and affirms as follows:

1. That his name is Kenneth E. Zimmerman and that he is employed as Resident Engineer, United States Army Corps of Engineers, Huntington District, 502 8th Street, Huntington, West Virginia 25701;

2. That in such capacity, and in furtherance of his employment, he was the Resident Engineer on behalf of the United States Army Corps of Engineers involved with contract number DACW 45-83-C-0164, Drum Bulk And Other Waste Removal At Chem-Dyne, Hamilton, Ohio;

3. That the notice to proceed on contract number DACW 45-83-C-0164 was issued on April 27, 1983, to O H Materials Comapny, Division of KBI Corp., 16406 Street, Route 224 East, Findlay, Ohio 45840;

4. That, pursuant to contract number DACW 45-83-C-0164, O H Materials Comapny was required to complete the total surface cleanup of the Chem-Dyne fucilities in Hamilton, Ohio, including the removal of all chemicals, drainage of all containers located on the surface of the Chem-Dyne facilities in Hamilton, Ohio, and removal of all such containers;

5. That, as of December 22, 1983, the total surface cleanup of the Chem-Dyne facilities in Hamilton, Ohio, has been completed and that no chemicals, containers, or other items holding chemicals or other wastes remain on the Chem-Dyne facilities in Hamilton, Ohio as of this date.

6. That the surface cleanup of the Chem-Dyne facilities has been completed in total and that no surface cleanup of the Chem-Dyne facilities remains to be done.

/s/ Kenneth E. Zimmerman

STATE OF WEST VIRGINIA)
) SS:
COUNTY OF)

Before me, the undersigned, a notary public in and for said county and state personally appeared the above named affiant, and acknowledged the signing of the foregoing Affidavit at his voluntary act and deed.

In Testimony Whereof, I have hereunto subscribed my name and affixed my notarial seal on the 13 day of January, 1984.

/s/ RUTH V. BOTTOMS
Notary Public

APPENDIX P

RELEVANT PROVISIONS OF THE BANKRUPTCY REFORM ACT OF 1978

11 U.S.C. Section 101

In this title –

• • •

(4) "claim" means –

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured;

• • •

(11) "debt" means liability on a claim

11 U.S.C. Section 105

(a) The bankruptcy court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.

(b) Notwithstanding subsection (a) of this section, a bankruptcy court may not appoint a receiver in a case under this title.

11 U.S.C. Section 362

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title operates as a stay, applicable to all entities, of–

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other proceeding against the debtor that was or could have been commenced before the commencement of the case under this title or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

(b) The filing of a petition under section 301, 302, or 303 of this title does not operate as a stay—

(1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor;

(2) under subsection (a) of this section, of the collection of alimony, maintenance, or support from property that is not property of the estate;

(3) under subsection (a) of this section, of any act to perfect an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title;

(4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

(5) under subsection (a)(2) of this section, of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

(6) under subsection (a)(7) of this section, of the setoff of any mutual debt and claim that are commodity futures contracts, forward commodity contracts, leverage transactions, options, warrants, rights to purchase or sell commodity futures contracts or securities, or options to purchase or sell commodities or securities;

(7) under subsection (a) of this section, of the commencement of any action by the Secretary of Housing and Urban Development to foreclose a mortgage or deed of trust in any case in which the mortgage or deed of trust held by said Secretary is insured or was formerly insured under the National Housing Act and covers property, or combinations of property, consisting of five or more living units; or

(8) under subsection (a) of this section, of the issuance to the debtor by a governmental unit of a notice of tax deficiency.

(c) Except as provided in subsections (d), (e), and (f) of this section—

(1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate; and

(2) the stay of any other act under subsection (a) of this section continues until the earliest of–

(A) the time the case is closed;
(B) the time the case is dismissed; and
(C) if the case is a case under chapter 7 of this title concerning an individual or a case under chapter 9, 11, or 13 of this title, the time a discharge is granted or denied.

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay–

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest; or

(2) with respect to a stay of an act against property, if–

(A) the debtor does not have an equity in such property; and
(B) such property is not necessary to an effective reorganization.

(e) Thirty days after a request under subsection (d) of this section for relief from the stay of any act against property of the estate under subsection (a) of this section, such stay is terminated with respect to the party in interest making such request, unless the court, after notice and a hearing, orders such stay continued in effect

pending, or as a result of, a final hearing and determination under subsection (d) of this section. A hearing under this subsection may be a preliminary hearing, or may be consolidated with the final hearing under subsection (d) of this section. If the hearing under this subsection is a preliminary hearing–

(1) the court shall order such stay so continued if there is a reasonable likelihood that the party opposing relief from such stay will prevail at the final hearing under subsection (d) of this section; and

(2) such final hearing shall be commenced within thirty days after such preliminary hearing.

(f) The court, without a hearing, shall grant such relief from the stay provided under subsection (a) of this section as is necessary to prevent irreparable damage to the interest of an entity in property, if such interest will suffer such damage before there is an opportunity for notice and a hearing under subsection (d) or (e) of this section.

(g) In any hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section–

(1) the party requesting such relief has the burden of proof on the issue of the debtor's equity in property; and

(2) the party opposing such relief has the burden of proof on all other issues.

11 U.S.C. Section 727

(a) The court shall grant the debtor a discharge, unless–

(1) the debtor is not an individual;

(2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed–

(A) property of the debtor, within one year before the date of the filing of the petition; or
(B) property of the estate, after the date of the filing of the petition;

(3) the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case;

(4) the debtor knowingly and fraudulently, in or in connection with the case–

(A) made a false oath or account;
(B) presented or used a false claim;
(C) gave, offered, received or attempted to obtain money, property, or advantage, or a promise of money, property, or advantage, for acting or forbearing to act; or

(D) withheld from an officer of the estate entitled to possession under this title, any recorded information, including books, documents, records and papers, relating to the debtor's property or financial affairs;

(5) the debtor has failed to explain satisfactorily, before determination of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities;

(6) the debtor has refused, in the case–

(A) to obey any lawful order of the court, other than an order to respond to a material question or to testify;
(B) on the ground of privilege against self-incrimination, to respond to a material question approved by the court or to testify, after the debtor has been granted immunity with respect to the matter concerning which such privilege was invoked; or
(C) on a ground other than the properly invoked privilege against self-incrimination, to respond to a material question approved by the court or to testify;

(7) the debtor has committed any act specified in paragraph (2), (3), (4), (5), or (6) of this subsection, on or within one year before the date of the filing of the petition, or during the case, in connection with another case concerning an insider;

(8) the debtor has been granted a discharge under this section, under section 1141 of this title, or under section 14, 371 or 476 of the Bankruptcy Act, in a case commenced within six years before the date of the filing of the petition;

(9) the debtor has been granted a discharge under section 1328 of this title, or under section 660 or 661 of the Bankruptcy Act, in a case commenced within six years before the date of the filing of the petition, unless payments under the plan in such case totaled at least–

(A) 100 percent of the allowed unsecured claims in such case; or
(B)(i) 70 percent of such claims; and
(ii) the plan was proposed by the debtor in good faith, and was the debtor's best effort; or

(10) the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter.

(b) Except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter, and any liability on a claim that is determined under section 502 of this title as if such claim had arisen before the commencement of the case, whether or not a proof of claim based on any such debt or liability is filed under section 501 of this title, and whether or not a claim based on any such debt or liability is allowed under section 502 of this title.

(c)(1) The trustee or a creditor may object to discharge under subsection (a) of this section.

(2) On request of a party in interest, the court may order the trustee to examine the acts and conduct of the debtor to determine whether a ground exists for denial of discharge.

(d) On request of the trustee or a creditor, and after notice and a hearing, the court shall revoke a discharge granted under subsection (a) of this section if–

(1) such discharge was obtained through the fraud of the debtor, and the requesting party did not know of such fraud until after the granting of such discharge;

(2) the debtor acquired property that is property of the estate, or became entitled to acquire property that would be property of the estate, and knowingly and fraudulently failed to report the acquisition of, or entitlement to, such property, or to deliver or surrender such property to the trustee; or

(3) the debtor committed an act specified in subsection (a)(6) of this section.

(e) The trustee or a creditor may request a revocation of a discharge–

(1) under subsection (d)(1) of this section, within one year after such discharge was granted; or

(2) under subsection (d)(2) or (d)(3) of this section, before the later of—

(A) one year after the granting of such discharge; and

(B) the date the case is closed.

CERTIFICATE OF SERVICE

I certify that three copies of this Joint Appendix were mailed pursuant to Supreme Court Rule 28.3 by United States mail, first-class postage prepaid, this _____ day of April, 1984 to John A. Garretson, 118 S. Second Street, Hamilton, Ohio 45011, to Harry M. Hoffheimer, 900 Tri-State Building, Cincinnati, Ohio 45202; to E. Hanlin Bavely, 604 Tri-State Building, Cincinnati, Ohio 45202.

E. DENNIS MUCHNICKI
Assistant Attorney General
Counsel of Record for Petitioner

AMICUS CURIAE

BRIEF

Office - Supreme Court, U.S.
FILED
MAY 18 1984
ALEXANDER L. STEVAS,

No. 83-1620

In the Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF OHIO, PETITIONER

v.

WILLIAM LEE KOVACS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

REX E. LEE
Solicitor General

F. HENRY HABICHT, II
Assistant Attorney General

LOUIS F. CLAIBORNE
Deputy Solicitor General

KATHRYN A. OBERLY
Assistant to the Solicitor General

PETER R. STEENLAND, JR.
DIRK D. SNEL
WENDY B. JACOBS
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

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31pp

QUESTION PRESENTED

Whether the discharge provisions of the 1978 Bankruptcy Code, 11 U.S.C. 524 and 727, operate to excuse a bankrupt polluter from a state court injunction requiring him to remove hazardous wastes from a dumpsite.

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In the Supreme Court of the United States

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

Like its predecessor, *Kovacs I*,[1] this case presents an important question about the use of the 1978 Bankruptcy Code to impede the ability of state and federal governments to safeguard public health and safety by enforcing environmental protection statutes. In this instance, the issue is whether a bankrupt defendant may rely on the discharge provisions of the Bankruptcy Code, 11 U.S.C. 524 and 727, to void an injunction that requires him to clean up a hazardous waste disposal site.

[1] As we detail in a moment, in *In re Kovacs* (*Kovacs I*), 681 F.2d 454 (6th Cir. 1982), vacated and remanded, No. 82-815 (Jan. 24, 1983), the court of appeals held that the automatic stay provision of the Bankruptcy Code (11 U.S.C. 362) barred enforcement of the same state court injunction involved here, insofar as it required the turnover of assets or income of the debtor to implement the clean-up of the waste disposal site. When the State sought review in this Court, we filed a memorandum supporting the petition. On January 24, 1983, the Court granted certiorari, vacated the judgment of the court of appeals, and remanded the case for consideration of mootness. The court of appeals has not yet acted on the remand.

The problem extends beyond state enforcement actions. It also arises when the United States seeks to enforce clean-up obligations imposed by federal law, including the Clean Water Act, 33 U.S.C. 1251 *et seq.*; the Resource Conservation and Recovery Act of 1976, 42 U.S.C. (Supp. V) 6901 *et seq.*; the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. (Supp. V) 9601 *et seq.*; the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1201 *et seq.*; and the Clean Air Act, 42 U.S.C. (Supp. V) 7401 *et seq.* Even as it bears on local enforcement efforts, the decision below implicates the national commitment to a safer environment by encouraging offenders to file for bankruptcy, and thereby excuse themselves from performing orders that require them to abate the health hazards they have created.[3]

STATEMENT

1. Prior to filing his petition in bankruptcy, the respondent, William Kovacs, had been engaged in the business of industrial and hazardous waste disposal in Ohio. His business was "quite profitable," and his "corporate empires" dealt in "large sums of money" (Pet. App. A55). In 1976, the State of Ohio sued Kovacs as an individual and as the officer of several business entities, including the Chem-Dyne Corporation, for alleged violations of various state environmental laws. Among other things, the State's complaint charged that Kovacs and his corporations had improperly deposited the carcinogenic pesticides endrin, dieldrin, and heptaclor at the Chem-

[3] We have cause for concern that both Sixth Circuit decisions in this case may be used to cripple our own environmental enforcement efforts. Already, Kovacs himself has invoked *Kovacs I* to frustrate a federal action pending against him. *United States* v. *Chem-Dyne Corp., et al.*, No. C-1-82-849 (S.D. Ohio filed Aug. 26, 1982). At least one district court has refused to vacate a stay against an ongoing federal action in pursuit of an injunction that would order the defendant to abate the health hazard created by its disposal of asbestos wastes. *United States* v. *Johns-Manville Sales Corp.*, No. 81-299-D (D.N.H. Nov. 18, 1982).

Dyne site in Hamilton, Ohio, and that those wastes were leaking into the Great Miami River and its tributary, polluting the water, killing fish and wildlife, and destroying natural resources. In response to the lawsuit, Kovacs signed a stipulation and judgment entry in the Butler County Common Pleas Court (*id.* at A43-A51). Kovacs himself stipulated that approximately 860,000 gallons of liquid wastes and 4,000 barrels of solid and semi-solid sludges remained at the Chem-Dyne site (*id.* at A45). In the stipulated judgment, Kovacs agreed not to cause further pollution, to remove all hazardous wastes from the premises of the Chem-Dyne Corporation within one year (by July 1980), and to pay $75,000 to the Ohio Department of Natural Resources as compensation for damage to the State's natural resources (*id.* at A46-A47, A48-A50).

Kovacs failed to comply with any portion of the stipulated judgment (Pet. App. A53-A54); indeed, not only did he fail to pay the $75,000 monetary judgment and fail to clean up the Chem-Dyne site, but he brought additional wastes onto the site (*id.* at A54). Accordingly, Ohio returned to state court in January 1980, requesting the appointment of a receiver to implement the stipulated order. After taking evidence at a hearing, the state court found that Kovacs had acted "in flagrant disregard of the Stipulation and Judgment Decree" (*ibid.*). Because Kovacs' activity "definitely affects this entire community and conceivably the water for this entire area as well as the wild life, natural resources of the area, and the fish in the streams" (*id.* at A55), the state court appointed a receiver to collect Kovacs' non-exempt assets and use them to finance the costs of clean-up at the Chem-Dyne site (J.A. 4-16).[4]

Subsequently, in July 1980, Kovacs filed a personal petition in bankruptcy in the United States Bankruptcy

[4] The receiver was authorized "to receive and collect any and all sums of money due or owing to the defendant business entities or defendant Kovacs in any manner, whether the same are now due or shall hereafter become due and payable" (J.A. 13).

Court for the Southern District of Ohio. *In re Kovacs*, Bankr. No. B-1-80-1499.[4] In an effort to ensure the availability of adequate funds to implement the clean-up order, Ohio sought a state court hearing on Kovacs' current employment status and income. Kovacs thereupon moved the bankruptcy court to enjoin Ohio from proceeding in state court. He argued that the State's goal was to obtain an order permitting the state court receiver to use Kovacs' post-bankruptcy income to satisfy the unfulfilled obligation to clean up the Chem-Dyne site and that such an order would violate the automatic stay provision of 11 U.S.C. 362. The bankruptcy court agreed (J.A. 23-32).

2. The bankruptcy court readily acknowledged that neither the clean-up order nor the order imposing the receivership gave the State a money judgment with respect to cleaning up the Chem-Dyne premises (J.A. 28).[5] Nonetheless, the bankruptcy court enjoined the State from proceeding in state court "to levy on" Kovacs' post-filing wages (J.A. 32). It reasoned that "there is no difference in substance between efforts to collect money from a debtor by securing a court order, and efforts to enforce a money judgment against him * * * [and] therefore, that the State is estopped to deny that it is not [*sic*] seeking to enforce a money judgment against debtor" (J.A. 28).

The State appealed to the United States District Court for the Southern District of Ohio, which affirmed. The district court, too, found that the State sought to collect money "just as though it were enforcing a money judgment" (J.A. 20). Accordingly, the district court held the

[4] Kovacs' original petition sought reorganization under Chapter 11 of the Bankruptcy Code. In September 1980, the bankruptcy court, at Kovacs' request, converted the action to one for straight bankruptcy under Chapter 7 of the Code. See Pet. App. A3.

[5] The State concedes that it cannot enforce that part of the 1979 stipulated order requiring Kovacs to pay the State $75,000 (Pet. 6 n.*).

automatic stay applicable "because the state's effort is clearly to enforce a judgment obtained before the filing of the Bankruptcy petition" (*ibid.*).

3. The Sixth Circuit affirmed in *Kovacs I*, 681 F.2d 454 (1982). The court concluded that, while Section 362(b) clearly permitted governmental units to continue to enforce their police powers through mandatory injunctions despite the filing of a bankruptcy petition, it denied them the power to collect money in their enforcement efforts (681 F.2d at 456). Like the two lower courts, the court of appeals also believed that Ohio had returned to state court in pursuit of what "in essence" amounted to a money judgment against Kovacs, which was "properly" subject to the automatic stay (*ibid.*). Concerned that the state court had ordered Kovacs to release all non-exempt assets, including money payable to himself in the future, the Sixth Circuit could find "little in substance to distinguish that order and a money judgment" (*ibid.*). It concluded that Ohio's attempt to reach Kovacs' post-bankruptcy earnings would "subvert" the purpose of the Bankruptcy Code to rehabilitate debtors "and to give them relief from harassing creditors" (*ibid.*).

4. Subsequently, this Court granted Ohio's petition for a writ of certiorari in *Kovacs I*, vacated the judgment, and remanded the case to the Sixth Circuit "to consider the question of mootness" (No. 82-615 (Jan. 24, 1983)). At that time, an appeal was pending in the Sixth Circuit from the lower courts' determination that the state court clean-up injunction would be voided by a discharge under the Bankruptcy Code. It is that determination that gives rise to the instant case.[6]

[6] The present decision of the Sixth Circuit (rendered by a panel different from that in *Kovacs I*) recites that "[t]he panel of [the court of appeals] that considered the automatic stay aspect of the case dealing with 11 U.S.C. Section 362 has not yet had an opportunity to act on this remand [from the Supreme Court]" (Pet. App. A7 n.5). It seems obvious, however, that the automatic stay question will be moot, as a practical matter, if the present ruling stands, since the underlying obligation will be discharged. On the other

5. On October 20, 1980, the State of Ohio filed a complaint in the bankruptcy court seeking a declaration that the obligations imposed on Kovacs by the consent decree and the state court injunction—to remove and dispose of industrial and other wastes at the Chem-Dyne site—could not be discharged in bankruptcy (Pet. App. A29-A37). The State argued that because the injunction did not constitute a "claim" or "debt," the duty to comply with it could not be discharged in bankruptcy. See 11 U.S.C. 101(4), 101(11), 524, 727(b).[7] The bankruptcy court extended the reasoning of its earlier decision that the automatic stay prevented the State from enforcing the injunction and held that because Kovacs would have to spend money in order to comply with the injunction, Kovacs "owes plaintiff a debt" that is dischargeable (Pet. App. A22). The court also ruled that only those debts listed within the exceptions to the discharge, 11 U.S.C. 523, could survive bankruptcy (Pet. App. A22).

6. The United States District Court for the Southern District of Ohio affirmed (Pet. App. A11-A16). It concluded that "under the law of the case principles, we must

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hand, if this Court reverses the most recent decision of the Sixth Circuit, the automatic stay, unless vacated by special order, will remain in effect until the bankruptcy proceedings are concluded, thereby inhibiting clean-up operations in the interim. Accordingly, under petitioner's submission, the automatic stay question is not moot. In light of the holding below that the instant decision is effectively governed by *Kovacs I* (see Pet. App. A10), it is appropriate for this Court to consider arguments and authority on the automatic stay issue at this time, particularly because the proper resolution of the automatic stay question sheds considerable light on the dischargeability question (see pages 8, 15-17, *infra*). See *Sony Corp. of America* v. *Universal City Studios, Inc.*, No. 81-1687 (Jan. 17, 1984), slip op. 16 n.17.

[7] The Bankruptcy Code defines "debt" as "liability on a claim" and defines "claim" as either the "right to payment" *or* the "right to an equitable remedy for breach of performance if such breach gives rise to a right to payment." 11 U.S.C. 101(4), (11). The provisions of the Bankruptcy Code pertinent to this case are set forth at J.A. 38-48.

accept the determination of the Sixth Circuit that the State was seeking what amounted to a money judgment against Kovacs" (*id.* at A15).[8] Thus, perceiving the State's attempt to enforce the injunction as a request for a monetary payment, the district court deemed the request a dischargeable "claim" or "debt" (*ibid.*).

7. The Sixth Circuit again affirmed (Pet. App. A1-A10). That court, like the district court and the bankruptcy court, ruled that efforts to force Kovacs to comply with the clean-up injunction by turning his income over to the state court receiver could not be distinguished from an attempt by the State to collect an "alternate right to payment" on a dischargeable "claim" (*id.* at A9). Though it recognized that there was no law of the case to apply since this Court had vacated the decision in *Kovacs I*, the Sixth Circuit expressly readopted the reasoning of its earlier opinion: "Ohio is essentially seeking to obtain a money payment from Kovacs" (Pet. App. A10). Like the bankruptcy court, the court of appeals suggested that only those debts listed within the Section 523 exceptions could survive a discharge (*ibid.*).

SUMMARY OF ARGUMENT

The court of appeals' decision improperly releases Kovacs from a mandatory injunction authorized by statute to protect public health and safety. By propounding an expansive definition of "money judgment" in *Kovacs I*, and then extending that same faulty approach in *Kovacs II*, the court eviscerated the difference between a dischargeable right to payment for a breach of performance and a non-dischargeable right to enforce an injunction that entails the expenditure of money. The consequence is that a preexisting obligation to clean up a hazardous waste disposal site—incorporated in a final judgment—has been wholly excused.[9]

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[8] The district court rendered its ruling on September 17, 1982, before this Court vacated the Sixth Circuit's judgment in *Kovacs I*.

[9] Under the Bankruptcy Code, a discharge "voids any judgment at any time obtained, to the extent that such judgment is a determina-

By encouraging abuse of the Bankruptcy Code to void obligations under state and federal environmental laws, the decision below flouts Congress's express intent to preserve the ability of governmental units to protect public health, safety, and the environment. Indeed, the decision effectively destroys the government's ability to enforce any statutory obligation—whether it be a regulation, permit, or clean-up injunction—against any bankrupt if compliance entails any expense by the debtor or its estate. This result finds no support in the Bankruptcy Code. The Code does not shield wrongdoers from all consequences of their actions; there is no fundamental or inalienable right to obtain a discharge in bankruptcy at the expense of the legislatively declared right of the public to be safe from environmental pollution.

ARGUMENT

A BANKRUPT POLLUTER MAY NOT SEEK REFUGE IN THE BANKRUPTCY CODE TO ESCAPE AN INJUNCTION THAT REQUIRES HIM TO CLEAN UP A HAZARDOUS WASTE DISPOSAL SITE

1. a. Because the present decision expressly builds on *Kovacs I*, and because the automatic stay provision of the Bankruptcy Code, 11 U.S.C. 362, "is the first part of bankruptcy relief" ultimately culminating in discharge (H.R. Rep. 95-595, 95th Cong., 1st Sess. 125 (1977)), it is appropriate to begin the analysis in this case with consideration of the automatic stay as it affects governmental actions to enforce police or regulatory powers. In general, the commencement of a bankruptcy action operates as a stay of all judicial or administrative proceedings against the debtor or its estate that were or could have been commenced prior to the filing of the bankruptcy petition. 11 U.S.C. 362(a)(1). The automatic stay also bars the enforcement against the debtor or its estate of a judgment obtained prior to the filing of the bankruptcy petition. 11 U.S.C. 362(a)(2).

tion of the personal liability of the debtor with respect to any debt discharged under [the Code]." 11 U.S.C. 524(a)(1). Moreover, a discharge "operates as an injunction against the commencement or continuation of an action, the employment of process, or any act, to collect, recover or offset any such debt * * *." 11 U.S.C. 524(a)(2).

Importantly, however, certain governmental litigation is wholly or partially exempt from the automatic stay. Section 362(b)(4) of the Code provides that the filing of a bankruptcy petition does not stay "the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory powers." For purposes of subsection (b)(4), it matters not what relief the government seeks: the government may commence or continue any police or regulatory action. Subsection (b)(5), on the other hand, specifies which judgments the government may not then seek to execute—ordinary money judgments. In the present case, there is no doubt that the state court order was obtained pursuant to Ohio's police or regulatory powers. The legislative history is unambiguous that the automatic stay does not apply to halt the commencement and continuation of environmental protection actions.[10] The only question, therefore, is whether the state court order sought to be enforced is a "money judgment" that cannot be executed without leave from the bankruptcy court.

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[10] H.R. Rep. 95-595, *supra*, at 343 (emphasis added):

> Paragraph (4) excepts commencement or continuation of actions and proceedings by governmental units to enforce police or regulatory powers. Thus, where a governmental unit is suing a debtor to prevent or stop violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws, or attempting to fix damages for violation of such a law, the action or proceeding is not stayed under the automatic stay.

See also S. Rep. 95-989, 95th Cong., 2d Sess. 52 (1978) (same); 124 Cong. Rec. 32395 (1978) (remarks of Rep. Edwards) (exception is intended "to permit governmental units to pursue actions to protect the public health and safety"); 125 Cong. Rec. 33995 (1978) (identical remarks by Sen. DeConcini).

Neither the Bankruptcy Code nor its legislative history specifically defines the term "money judgment." Congress did, however, explain that subsection (b)(5) excluded money judgments from the governmental exemption in order to prevent the government from receiving preferential treatment at the expense of other creditors.[10] *Obviously, when the government's interest in executing a judgment is essentially pecuniary, then its interest is akin to that of other creditors. The government's interest would be predominantly pecuniary, for example, if it sought to collect damages for injury to its property or natural resources (see page 3 & note 5, supra). In that case, there would be little justification for granting the government preferential treatment. By the same token, when the thrust of the government's action is not to collect money from the debtor but rather to protect the public health and safety, then the government does not stand in the shoes of an ordinary creditor. In short, when considering the applicability of the exemption to a given judgment, a court must initially scrutinize the governmental interest at stake in the litigation. The mere fact that a judgment entails the expenditure of money does not automatically remove it from the (b)(5) exemption.*

b. Many injunctions entail the expenditure of money for their performance. See Penn Terra Ltd. v. *Dep't of Environmental Resources*, No. 83-3449 (3d Cir. Apr. 30,

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[10] H.R. Rep. 95-595, *supra*, at 343:

> *Paragraph (5) makes clear that the exception extends to permit an injunction and enforcement of an injunction, and to permit the entry of a money judgment, but does not extend to permit enforcement of a money judgment. Since the assets of the debtor are in the possession and control of the bankruptcy court, and since they constitute a fund out of which all creditors are entitled to share, enforcement by a governmental unit of a money judgment would give it preferential treatment to the detriment of all other creditors.*

See also S. Rep. 95-989, 95th Cong., 2d Sess. 52 (1978) (same).

1984), slip op. 23; *United States* v. *Price*, 688 F.2d 204, 213 (3d Cir. 1982). A defendant may be ordered to conduct or fund a study to determine the extent of the threat posed by its waste disposal practices, *e.g.*, *Price*; to reclaim areas damaged by surface mining operations, *e.g.*, *Penn Terra*; to remove leaking drums of toxic wastes that threaten groundwater contamination, *e.g.*, *Kovacs*; to remove industrial wastes previously deposited in navigable waters, *e.g.*, *United States* v. *Republic Steel Corp.*, 362 U.S. 482, 490-493 (1960); to operate its plant in compliance with environmental regulations, *e.g.*, *Commonwealth* v. *Peggs Run Coal Co.*, 55 Pa. Commw. 312, 423 A.2d 765 (1980). In each case, when the government seeks to enforce the order, its aim is to protect the public health, not to enhance the public fisc.

Virtually every court to consider the issue has concluded that actions such as those noted above are exempt from the automatic stay and that the judgments may be executed even if they entail the expenditure of substantial funds. Thus, for example, in a case virtually identical to *Kovacs I*, Pennsylvania had obtained a state court order mandating remedial action by the operator of surface coal mines; among other things, the state court order required the company to reclaim the mines, implement soil erosion and sedimentation control plans, and restore and revegetate the mined area to its original contour. *Penn Terra Ltd.*, slip op. 4-5 n.2. Thereafter, Penn Terra filed for bankruptcy under Chapter 7 of the Code. The bankruptcy court and the district court held that Pennsylvania's attempts to enforce the state court injunction were barred by the automatic stay's application to governmental efforts to enforce "money judgments" (11 U.S.C. 362(b)(5)). The Third Circuit reversed, rejecting the argument that "a money judgment is anything which costs money to enforce" (slip op. 21). The court reasoned (slip op. 23 (footnote omitted)):

> Were we to find that any order which requires the expenditure of money is a "money judgment," then

> the exception to section 362 for government police action, which should be construed broadly, would instead be narrowed into virtual nonexistence. Yet we cannot ignore the fundamental fact that, in contemporary times, almost everything costs something. An injunction which does not compel some expenditure or loss of monies may often be an effective nullity.

The *Penn Terra* court also explained that the result it reached was most faithful to Congress's intent to accommodate the competing interests at stake (slip op. 23-24):

> It appears that * * * the Bankruptcy Court * * * placed too much weight on the value of preserving the corpus of the debtor's funds and estate under its own exclusive control. Admittedly, that goal is normally central to the statutory scheme of the Bankruptcy Code. * * * [I]n some instances this policy is in inexorable conflict with other, no less salutary, governmental goals. We believe that the resolution of this conflict is contained in the statute itself. In enacting exceptions to section 362, Congress recognized that in some circumstances, bankruptcy policy must yield to higher priorities. Indeed, if the policy of preservation of the estate is to be invariably paramount, then one could not have exceptions to the rule. Since Congress did provide for exceptions, however, we may safely assume that the goal of preserving the debtor's estate is not always the dominant goal.

The court concluded by employing the same analysis we urge here, focusing on the governmental interest advanced by the litigation rather than the effect on the debtor's purse. If the governmental action is intended "to prevent future harm to, and to restore, the environment" (slip op. 24), then it is not an action to enforce a money judgment of the sort barred by Section 362(b)(5).[10]

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[10] *United States* v. *Price*, *supra*, was not a bankruptcy case, but its reasoning is equally applicable here. In *Price*, the Third Circuit faulted the district court for adopting an unduly restrictive view of its equitable remedial powers in the context of environmental protection (688 F.2d at 211). The federal government had requested an order that defendants fund or conduct a diagnostic study of the threat posed by a hazardous waste landfill. The district court denied the request, believing it an attempt to transform a claim for damages into an equitable action. The Third Circuit disagreed (*id.* at 212):

> Damages are awarded as a form of substitutional redress. They are intended to compensate a party for an injury suffered or other loss. A request for funds for a diagnostic study of the public health threat posed by the continuing contamination and its abatement is not, in any sense, a traditional form of damages. The funding of a diagnostic study in the present case, though it would require monetary payments, would be preventive rather than compensatory. The study is intended to be the first step in the remedial process of abating an existing but growing toxic hazard which, if left unchecked, will result in even graver future injury, i.e., the contamination of Atlantic City's water supply.

(For other reasons, the Third Circuit was unable to find that the district court had abused its discretion in denying the government's request for a preliminary injunction (688 F.2d at 214).)

Similarly, in another case closely analogous to *Kovacs I* on its facts, the Commonwealth Court of Pennsylvania found the governmental action exempt from the bankruptcy stay. *Commonwealth* v. *Pegge Run Coal Co.*, 55 Pa. Commw. 312, 423 A.2d 765 (1980). There, Pennsylvania sued the owner of a coal mine and cleaning plant for alleged violations of various state environmental statutes. The complaint requested both a mandatory injunction ordering compliance with the laws and the posting of bonds to assure compliance with the injunction. The coal company, having filed a petition in bankruptcy, invoked the automatic stay provision of the Bankruptcy Code to block the state's action. After analyzing the legislative history, the Pennsylvania court concluded that the state was not attempting to enforce a money judg-

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ment. The court therefore held the proceeding exempt from the automatic stay. 423 A.2d at 767.[13]

In non-environmental cases as well, the courts have upheld governmental authority to enforce injunctions that entail the expenditure of money, notwithstanding the Code's automatic stay provision. Thus, for example, in *Donovan* v. *TMC Industries, Ltd.*, 20 Bankr. 997 (N.D. Ga. 1982), the district court held that the Bankruptcy Code could not be invoked to stymie the government's efforts to enforce payment of minimum wages required by the Fair Labor Standards Act because that Act "promote[s] public health and welfare." *Id.* at 1005. The

[13] We are aware of only one contrary case. *United States* v. *Johns-Manville Sales Corp.*, No. 81-299-D (D.N.H. Nov. 15, 1982) (refusing to vacate stay against governmental action to obtain a pollution abatement injunction). The *Manville* decision is flawed for several reasons. First, the court relied almost entirely on the simplistic notion, first advanced in *Kovacs I*, that any injunction requiring the expenditure of money must be a "money judgment." Second, the court failed to recognize that a prohibitory injunction (which it would have approved) does not adequately protect the public in many instances. For example, the mere cessation of polluting conduct does not prevent the spread of hazardous substances through the environment into public drinking water supplies; effective public protection therefore requires clean-up or containment of the pollution. The *Manville* court also erroneously assumed that the federal and state governments can finance the costs of clean-up themselves and then seek reimbursement from the polluter. Congress was well aware, however, that the funds available to the federal government under the so-called "Superfund" legislation, 42 U.S.C. (Supp. V) 9601 *et seq.*, would *not* be adequate to permit the government to take necessary action at the many thousands of existing dumpsites. See S. Rep. 96-848, 96th Cong., 2d Sess. 62-63 (1980); see *id.* at 2, 5, 17, 53-55, 57-58. In addition, the Superfund legislation imposes restrictions on the government's expenditures. See 42 U.S.C. (Supp. V) 9604; see also 40 C.F.R. 300.65(d), 300.67(e), 300.68(c) (National Contingency Plan). Finally, the rationale of the *Manville* decision is severely undercut by the court's inexplicable willingness to permit an injunction ordering the bankrupt both to cease and desist from further pollution and to post a bond to ensure compliance (slip op. 19). Such an injunction obviously would require the bankrupt to spend money.

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court therefore enjoined the bankrupt employer from shipping goods produced at sub-minimum wages. Fully recognizing that the employer could remedy the statutory violation and satisfy the injunction only by paying minimum wages for the production of those goods, *id.* at 1000, 1006, the court specified the manner in which the employer should set aside funds sufficient to remove the taint from its merchandise. Even though its order entailed the payment of money by the bankrupt into a trust fund, the court stressed that "[t]his is not a money judgment. Failure to comply with this Order cannot result in execution or levy." *Id.* at 1007. As the court observed, the purpose of the government's request for an injunction was not to enforce wage claims of underpaid workers in a single firm, but to safeguard "the welfare of every worker in that firm as well as the workers in competing companies" (*id.* at 1006) by the only means available, namely, by halting shipment to market of "tainted goods" in order to reduce the impact of substandard wages on an "entire industry." *Ibid.*[14]

c. It is thus clear that many governmental actions, even if they entail the expenditure of subtantial funds, are exempt from the Code's automatic stay.[15] Congress

[14] See also *NLRB* v. *Evans Plumbing Co.*, 639 F.2d 291 (5th Cir. 1981) (NLRB order requiring reinstatement of two wrongfully discharged employees not subject to automatic stay); *In re Thomassen*, 5 Collier Bankr. Cas. 2d 997, 1001 (9th Cir. Bankr. App. 1981) ("pecuniary purpose" test differentiates between governmental actions designed to defeat Bankruptcy Code relief and those brought in furtherance of police powers).

[15] This does not mean that the bankruptcy court is powerless to protect the estate when necessary. The bankruptcy court, in its discretion, may stay actions not covered by the automatic stay pursuant to its general powers under 11 U.S.C. 105. As Congress explained, however, there are certain actions, including governmental actions to protect the public health and welfare, as to which the normal presumption of the automatic stay is inappropriate and the burden of showing the need for a stay is more properly placed on the debtor (S. Rep. 95-989, 95th Cong., 2d Sess. 51 (1978)):

has made a policy judgment that these actions are too important to be held up for the many years that may be required to bring a bankruptcy case to completion.[16] As we now show, it would be anomalous indeed to hold that an action such as the present one is exempt from the automatic stay, which it clearly is, but to rule years later that the debtor's obligation is dischargeable in bankruptcy. Instead, the same factors that support the determination that enforcement of the judgment at issue

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The district court and the bankruptcy court as its adjunct have all the traditional injunctive powers of a court of equity * * *. Stays or injunctions issued under those other sections will not be automatic upon commencement of the case, but will be granted or issued under the usual rules for the issuance of injunctions. By excepting an act or action from the automatic stay, the bill simply requires that the trustee move the court into action, rather than requiring the stayed party to request relief from the stay. There are some actions, enumerated in the exceptions, that generally should not be stayed automatically upon commencement of the case, for reasons of either policy or practicality. Thus, the court will have to determine on a case-by-case basis whether a particular action which may be harming the estate should be stayed.

See also H.R. 95-595, *supra*, at 342 (same). Although the question is not at issue here, we would note our view that a debtor such as Kovacs would face a difficult task in attempting to satisfy "the usual rules for the issuance of injunctions." The public interest in cleaning up a hazardous waste site almost certainly would outweigh the trustee's interest in preserving the debtor's estate. Nevertheless, the authority to issue injunctions in appropriate cases mitigates whatever harshness might otherwise be thought to flow from the governmental exemption to the automatic stay.

[16] In general, the automatic stay remains in effect until discharge. 11 U.S.C. 362(c)(2). Depending upon the size of the estate, it may take anywhere from a few months to several years to reach that point. In Kovacs' case, the automatic stay is still in effect, and his debts have not yet been discharged, even though the bankruptcy petition was filed in July 1980. (The ruling on dischargeability at issue in this case was obtained in response to Ohio's request for a declaratory judgment and applies only to Kovacs' obligations under the state court injunction; the dischargeability of the rest of his debts remains to be determined.)

should not have been stayed by the filing of the bankruptcy petition likewise support the conclusion that Kovacs' obligations under the state court injunction are not dischargeable.

2. A discharge under the Bankruptcy Code operates to erase a bankrupt's debt. 11 U.S.C. 524(a). The Code defines "debt" as "liability on a claim." 11 U.S.C. 101(11). Although the term "claim" is defined broadly, 11 U.S.C. 101(4), it explicitly excludes from its embrace the type of injunction at issue here. Two classes of rights are dischargeable in bankruptcy: (1) any right to payment, and (2) a right to an equitable remedy for breach of performance if such breach itself gives rise to a right to payment. 11 U.S.C. 101(4). The clean-up injunction here does not redress a breach of performance, nor does it operate as an alternative to a right to payment. Rather, it orders compliance with state statutes by requiring the abatement of a public health and environmental hazard.

a. The legislative evolution of the definition of "claim" demonstrates conclusively the agreement of both Houses of Congress that a bankruptcy discharge would not extinguish rights to all equitable remedies. As originally proposed, the definition of "claim" included "an equitable right to performance that does not give rise to a right to payment." H.R. Rep. 95-595, *supra*, at 309 (emphasis added). *See* H.R. 8200, 95th Cong., 1st Sess. (1977). During the course of debate and amendments, both Houses narrowed the breadth of the definition. As explained by one of the bill's sponsors, Representative Edwards (124 Cong. Rec. 32393 (1978) (emphasis added)):

> Section 101(4)(B) represents a modification of the House-passed bill to include [in] the definition of "claim" a right to an equitable remedy for breach of * * * performance if such breach gives rise to a right to payment. This is intended to cause the liquidation or estimation of contingent rights of payment for which there may be an alternative equitable

remedy with the result that the equitable remedy will be susceptible to being discharged in bankruptcy. For example, in some States, a judgment for specific performance may be satisfied by an alternative right to payment, in the event performance is refused; in that event, the creditor entitled to specific performance would have a "claim" for purposes of a proceeding under title II.

On the other hand, rights to an equitable remedy for a breach of performance with respect to which such breach does not give rise to a right to payment are not "claims" and would therefore not be susceptible to discharge in bankruptcy.[17]

As enacted, Section 101(4)(B) limits the definition of "claim" by excluding any right to an equitable remedy for a breach of performance when the breach does not also give rise to an alternative right to payment.[18]

The clean-up injunction at issue here plainly lies within the class of equitable rights excluded from the definition of "claim," and thereby preserved from discharge in bankruptcy.[19] The state court's order required Kovacs to re-

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[17] See also 124 Cong. Rec. 33992 (1978) (substantially identical remarks of Sen. DeConcini).

[18] See generally Matthews, *The Scope of Claims Under the Bankruptcy Code*, 57 Am. Bankr. L.J. 221 (Installment 1) and 339 (Installment 2) (1983); 2 *Collier on Bankruptcy* ¶ 101.04 (15th ed. 1984).

[19] The Sixth Circuit plainly erred in its conclusion that "in the absence of any contention by the State of Ohio in the Bankruptcy Court that the judgment obligation of Kovacs is exempted from discharge under some provision of Section 523, a discharge under Section 727 is warranted" (Pet. App. A10). Whether an order fits within an exemption (11 U.S.C. 523) to the discharge provision is simply irrelevant to the threshold question: whether the order constitutes a "claim." Notably, there is no exemption provided for criminal restitution. Yet, as discussed later (see pages 22-23, *infra*), the obligation to make such payments survives discharge. Similarly, the obligation to abate a health and environmental endangerment should survive discharge.

It is possible, of course, that in certain cases a clean-up obligation would be non-dischargeable under 11 U.S.C. 523(a)(6), which ex-

move and dispose of all industrial and hazardous wastes at the dumpsite; the order did not redress a breach of performance or compensate the State for any pecuniary loss or otherwise satisfy any right to payment. That the injunction did not operate as a money judgment is obvious from the fact that the court separately ordered Kovacs to pay the State some $75,000 for damage to the State's natural resources.

The district court readily acknowledged that the Ohio statutes authorizing the clean-up injunction did not provide the State with an alternative right to a money payment (Pet. App. A14-A15). See Pet. 22. The court of appeals made no contrary finding. Instead, to determine whether the clean-up injunction was a "claim" that could be discharged in bankruptcy, the Sixth Circuit bypassed the statutory definition and reverted to the simplistic test formulated in *Kovacs I*: if the injunction entails the expenditure of money, then it must be a right to payment which is a dischargeable claim. See Pet. App. A9-A10. By this faulty logic, equating mandatory injunctions with money judgments, the court of appeals read the injunctive relief provisions out of a host of environmental statutes and thereby robbed the government of a vital tool for protecting public health and the environment from environmental violations. A plethora of federal statutes all include provisions in which Congress explicitly authorized courts to issue mandatory injunctions to clean up or otherwise abate health, safety, and environmental

---

empts from discharge any debt "for willful and malicious injury by the debtor to another entity or to the property of another entity." In light of Kovacs' "flagrant disregard" of the state court injunction and his continued discharge of hazardous waste after entry of the stipulated judgment (Pet. App. A54), Section 523(a)(6) may be especially applicable to the instant case. As a general matter, however, a polluter's obligation to clean up his unlawful discharges does not depend on his state of mind. Whether the violation is willful or not, the need to protect the public health and welfare remains the same. We therefore agree with petitioner that this case should be decided on the basis of the statutory definitions of "debt" and "claim."

hazards.[20] Here, Ohio invoked an analogous injunction provision from its own body of environmental legislation.

The court below cavalierly suggested (Pet. App. A9-A10) that the State may pursue other remedies against Kovacs, such as penalties and criminal sanctions. But, of course, penalties and sanctions merely complement orders to abate a threat to public health and safety caused by environmental pollution; they do not accomplish a clean-up. Effective protection for the public depends on the ability of state and federal governments to enforce their respective environmental protection statutes and permits. Mandatory clean-up injunctions, damages to compensate for pecuniary loss or harm to natural resources, fines, and penalties each serve a distinct function in the scheme of statutory remedies available to governmental units. The court of appeals' failure to appreciate this fact led it to err.

b. The court below mistakenly assumed that the significance to Ohio of the consent decree and injunction is that Kovacs "'pay *compensation* • • • for pecuniary loss'" (Pet. App. A7 (emphasis in original; citation omitted)). As we have discussed in connection with the automatic stay, this approach obliterates the distinction between a money judgment for compensation and an injunction ordering the abatement of a health and safety hazard, when such abatement entails the expenditure of funds. Only the latter is at issue here.

In the present case, the state court's orders were strictly preventive, not compensatory. Initially, the court ordered Kovacs himself to clean up the dumpsite. Only subsequently, upon the State's showing that Kovacs had not complied, did the state court order Kovacs to release certain assets and future earnings to the court-appointed

[20] See, *e.g.*, the Clean Water Act, 33 U.S.C. 1364; the Resource Conservation and Recovery Act of 1976, 42 U.S.C. (Supp. V) 6973(a); the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. (Supp. V) 9606(a); the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1271(a)(2); and the Clean Air Act, 42 U.S.C. (Supp. V) 7603(a).

receiver. Although this latter order directed the payment of money by Kovacs to the receiver, the receivership was established for the limited purpose of implementing the clean-up order. Accordingly, both orders, each directed to clean-up of the dumpsite, must be distinguished from traditional money judgments.[21]

The Third Circuit expressly recognized this distinction in *Penn Terra Ltd.*, slip op. 24:

> We believe that the inquiry is more properly focused on the nature of the injuries which the challenged remedy is intended to redress—including whether plaintiff seeks compensation for past damages or prevention of future harm—in order to reach the ultimate conclusion as to whether these injuries are traditionally rectified by a money judgment and its enforcement. Here, the Commonwealth Court injunction was, neither in form nor substance, the type of remedy traditionally associated with the conventional money judgment. It was not intended to provide compensation for past injuries. It was not reducible to a sum certain. No monies were sought by the Commonwealth as creditor or obligee. The Commonwealth was not seeking a traditional form of damages in tort or contract, and the mere payment of money, without more, even if it could be estimated, could not satisfy the Commonwealth Court's direction to complete the backfilling, to update erosion plans, to seal mine openings, to spread topsoil, and to implement plans for erosion and sedimentation control. Rather, the Commonwealth Court's injunction was meant to prevent future harm to, and to restore, the environment.

In sum, remedial orders obtained under the endangerment provisions of environmental statutes may require the expenditure of money either directly or indirectly.

[21] "A money judgment is one which adjudges the payment of a sum of money, as distinguished from one directing an act to be done or property to be transferred or restored. 2 Bouv. Law. Dict. p. 2240." *United States Fidelity & Guaranty Co. v. Ft. Misery Highway Dist.*, 32 F.2d 869, 872 (9th Cir. 1927).

Nevertheless, such remedial orders do not compensate the government for harm or expenses incurred. Their objective is, rather, to protect the public by assuring compliance with environmental laws and by ordering abatement of health and environmental hazards. The court of appeals' view of the relationship between the Bankruptcy Code and governmental enforcement actions, as formulated in *Kovacs I* and readopted in *Kovacs II*, improperly ignores the purpose of the governmental action and focuses exclusively on the impact of the governmental action on the debtor's purse. That approach cripples the government's ability to exercise its police powers to protect public health, safety, and the environment, and it finds no support in the Bankruptcy Code.

3. The decision below ignores the fact that the Bankruptcy Code is not a safe haven for wrongdoers. See S. Rep. 95-989, 95th Cong., 2d Sess. 51 (1978); H.R. Rep. 95-595, *supra*, at 342. Although the general policy of the Code is to provide a "fresh start" for those in financial difficulty, nowhere in the Code did Congress suggest an intent to grant "pardons" to those who have violated the law or jeopardized the public health and safety. A series of analogous cases demonstrate the error of the court of appeals' contrary conclusion.

a. The courts have consistently held that a bankrupt defendant's obligation to pay criminal restitution—whether ordered by another court before or after the petition in bankruptcy—survives discharge. *E.g., United States* v. *Carson*, 669 F.2d 216 (6th Cir. 1982); *In re Magnifico*, 7 Collier Bankr. Cas. 2d 258 (Bankr. D. Ariz. 1982); *In re Newton*, 15 Bankr. 708 (Bankr. N.D. Ga. 1981). Criminal restitution orders require bankrupt defendants to make payments to persons, the victims, who could not themselves bring civil actions against the defendants due to the Bankruptcy Code. The courts have uniformly held criminal restitution actions and orders immune from the Bankruptcy Code on the ground that the government's action is undertaken in the public interest, whether it be to protect the public by deterring criminal conduct or to rehabilitate criminal offenders.[18] The analysis focuses on the purpose of the governmental action—not the fact that the restitution order requires a bankrupt to spend money. *United States* v. *Carson*, 669 F.2d at 217. See also *Barnette* v. *Evans*, 673 F.2d 1250, 1251 (11th Cir. 1982) (overturning bankruptcy court's stay of criminal restitution proceedings on ground that public interest in such proceedings "overrides any interest the bankruptcy court may have in protecting the financial interest of debtors"); *In re Lore*, 7 Collier Bankr. Cas. 2d 394 (Bankr. D. Md. 1982) (court refused to stay criminal prosecution that included a request for a fine because suit aimed to protect public, not simply to obtain payment). The same analysis should have been applied in *Kovacs II*. Here, too, the government's action was undertaken in the public interest to protect public health and safety, not to exact money from Kovacs.

b. In other contexts, too, bankruptcy courts have found the public interest paramount to the debtor's interest in a "fresh start" under the Bankruptcy Code. Especially pertinent is the decision in *In re Canarico Quarries, Inc.*, 466 F. Supp. 1333 (D.P.R. 1979). There, the district court overturned a bankruptcy court's order prohibiting the Puerto Rico Environmental Quality Board from enforcing regulations under the federal Clean Air Act against the debtor. The district court held that although the bankruptcy laws strive to promote the rehabilitation of debtors, such rehabilitation must be done within the law. Thus, the debtor must comply fully with state and federal environmental regulations, even though such compliance may be costly.[19]

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[18] As previously noted (see page 18 note 19, *supra*), the Bankruptcy Code provides no express exemption from discharge for criminal restitution, yet that "omission" does not affect the obligation to make such payments. Again, therefore, the court of appeals' emphasis (Pet. App. A19) on the absence of an express exemption for mandatory clean-up injunctions was misplaced.

[19] The cost of compliance was estimated to be $333,000 (466 F. Supp. at 1334). Although *Canarico Quarries* was decided under the old Bankruptcy Act, the court took pains to analyze the recently

Similarly, in *In re Charles George Land Reclamation Trust*, 8 Collier Bankr. Cas. 2d 1307 (Bankr. D. Mass. 1983), the court dismissed the bankruptcy petition of a polluter to permit the state and federal governments to proceed with actions to take control of the bankrupt's property in order to protect public health and the environment from an environmental emergency. Hazardous substances disposed of by the bankrupt were leaking from his property into waters that fed a public drinking water supply. "The ongoing violation of state law and the serious and immediate danger posed to the citizenry in the surrounding area by these violations, mandated that the Federal and State environmental agencies be given full and complete control of the hazardous waste site as soon as possible." *Id.* at 1313.[20]

Finally, in a decision that preceded the 1978 Bankruptcy Code, the Fourth Circuit denied the request of a bankruptcy trustee to abandon useless, dilapidated barges floating in a harbor and ordered the trustee to remove the barges at the expense of the estate. *Ottenheimer v. Whitaker*, 198 F.2d 289 (4th Cir. 1952). "There can be no doubt that the property not only has no value, but also that the care and disposition of it will involve the expenditure of a substantial sum of money. * * * [Nonetheless,] we are not dealing with a burden imposed upon the bankrupt or his property by contract, but a duty and a burden imposed upon an owner of vessels by an Act of Congress in the public interest." *Id.* at 290.

As in all of these cases, so here, the ability of the government to exercise its police power to protect the public

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enacted amendments to the Code and concluded that the Code compelled the same result. *Id.* at 1339-1340.

[20] *See also In re Fernwood Real Estate Investment Trust*, 28 Bankr. 804, 808 (Bankr. D. Vt. 1982) (court ordered the bankrupt's estate to reimburse the city for the cost of removing a dangerous building from the bankrupt's property, reasoning that the expenses was a cost of administering the estate, "necessary for the safety and welfare of the public in general").

must not be extinguished solely because it results in an expense for the debtor.

4. The decision below improperly offers bankrupt polluters a "fresh start" without regard for public health, safety, and the environment. According to the logic of the Sixth Circuit's opinion, had Kovacs created an nuisance in his backyard small enough that he personally could sweep it up without the help of equipment or technicians, then a clean-up injunction would be enforceable against him. But because Kovacs created a public health hazard so extensive and so dangerous that safe clean-up requires him to employ independent, experienced contractors, the court will not order Kovacs to satisfy this costlier injunction. Ironically, the decision below provides that the more dangerous the environmental violation, the easier it will be for the polluter to avoid responsibility.

The Bankruptcy Code, however, does not abide this irony. It does not authorize courts to excuse every responsibility of every person who files a petition in bankruptcy. It explicitly preserves the power of governmental units to obtain and enforce injunctions to protect public health, safety, and the environment. The preservation of that power and of the remedial injunction at issue here makes sense within the framework of the Code: unlike ordinary creditors, the public does not contract with potential debtors and thus lacks leverage to require security against dangerous behavior. The public's only security lies in the ability of governments to enforce statutes to protect public health, safety, and the environment. Thus, by ignoring the purpose of Ohio's action and focusing exclusively on the effect of the clean-up injunction on Kovacs' purse, the court below fell into error.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

F. HENRY HABICHT, II
Assistant Attorney General

LOUIS F. CLAIBORNE
Deputy Solicitor General

KATHRYN A. OBERLY
Assistant to the Solicitor General

PETER R. STEENLAND, JR.
DIRK D. SNEL
WENDY B. JACOBS
Attorneys

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AMICUS CURIAE

BRIEF

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No. 83-1626

In The

Supreme Court of the United States

October Term, 1983

State of Ohio,

Petitioner

v.

William Lee Kovacs,

Respondent

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE COUNCIL OF STATE GOVERNMENTS, THE UNITED STATES CONFERENCE OF MAYORS, THE NATIONAL ASSOCIATION OF COUNTIES, THE NATIONAL GOVERNORS' ASSOCIATION, THE NATIONAL LEAGUE OF CITIES, AND THE INTERNATIONAL CITY MANAGEMENT ASSOCIATION AS AMICI CURIAE IN SUPPORT OF THE STATE OF OHIO

Lawrence R. Velvel *
Chief Counsel
Joyce Holmes Benjamin
Attorney
State and Local Legal Center
444 N. Capitol Street, N.W.
Suite 349
Washington, D.C. 20001
(202) 638-1445
Counsel for the Amici Curiae

* Counsel of Record

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QUESTION PRESENTED

Whether a polluter's obligation to obey an injunction requiring him to clean up hazardous conditions which he has created is dischargeable in bankruptcy.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1020

STATE OF OHIO,

Petitioner

v.

WILLIAM LEE KOVACS,

Respondent

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

The Council of State Governments, the United States Conference of Mayors, the National Association of Counties, the National Governors' Association, the National League of Cities, and the International City Management Association respectfully move this Court, pursuant to Rule 36, for leave to file the accompanying brief *amicus curiae* in support of petitioner, the State of Ohio.*

---

* Petitioner has consented to the filing of this brief. Respondent Kovacs has not, and it is therefore necessary to request leave to file.

The *amici* are organizations that represent state and local governments located throughout the United States. *Amici* and their members have a vital interest in legal issues that affect the powers and responsibilities of such governments. This case presents legal questions of great importance concerning the authority of these governments to enforce laws protecting the health and welfare of their citizens.

Enactment and enforcement of such laws, undertaken pursuant to the fundamental police power of state and local governments, is one of the basic sovereign functions of these governments. The governments have therefore passed environmental and hazardous waste laws that make it illegal to discharge dangerous and noxious substances into the air or water or to place them improperly on land. The laws also require violators to cure health hazards they have created. The laws are enforced by state court injunctions.

The lower court's decision, however, delivers a serious blow to the sovereign authority of state and local governments to protect the health and welfare of their citizens by means of these laws. The court ruled that, by securing a discharge in bankruptcy, an environmental polluter can evade his obligation to obey a state court injunction that enforces environmental laws and requires him to abate dangers he has created for the public health and safety. The court's ruling provides offenders with a blueprint for evading laws protecting the environment. It also raises grave statutory and constitutional questions concerning whether Congress intended, or has the constitutional authority, (1) to override the states' fundamental sovereign power to enact laws which protect their citizens against serious environmental hazards, or (2) to weaken sovereign authority and the rule of law by enabling violators to escape their obligation to obey state court injunctions. For these reasons, *amici* seek leave to

file this brief in order to assist the Court in resolving the issues raised by this case.

Respectfully submitted,

LAWRENCE R. VELVEL *
Chief Counsel
JOYCE HOLMES BENJAMIN
Attorney
State and Local Legal Center
444 N. Capitol Street, N.W.
Suite 349
Washington, D.C. 20001
(202) 638-1445
Counsel for the Amici Curiae

* Counsel of Record

May, 1984

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In The

Supreme Court of the United States

October Term, 1983

No. 83-1029

State of Ohio,

Petitioner

v.

William Lee Kovack,

Respondent

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF OF THE COUNCIL OF STATE GOVERNMENTS, THE UNITED STATES CONFERENCE OF MAYORS, THE NATIONAL ASSOCIATION OF COUNTIES, THE NATIONAL GOVERNORS' ASSOCIATION, THE NATIONAL LEAGUE OF CITIES, AND THE INTERNATIONAL CITY MANAGEMENT ASSOCIATION AS AMICI CURIAE IN SUPPORT OF THE STATE OF OHIO

INTEREST OF THE AMICI CURIAE

The interest of the *amici* is detailed in the motion accompanying this brief.

STATEMENT OF THE CASE[1]

Respondent, William Lee Kovack, was an owner and principal officer of Chem-Dyne Corporation. Chem-Dyne

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[1] References to the Appendix filed with the Petition for Certiorari shall be noted as App. ———.

operated a hazardous waste disposal facility in Hamilton, Ohio, where it stored, treated, disposed of, and recycled industrial wastes. Its activities took place under Kovacs' direction, and it was one of several waste handling corporations created by Kovacs. Kovacs' companies served a large number of major American corporations, had "apparently been quite profitable," and dealt "in large sums of money." App. 56.

In September, 1976, the state of Ohio filed suit against Kovacs and Chem-Dyne, charging them with causing water and air pollution in violation of the state's environmental laws. The complaint asserted, *inter alia*, that defendants had discharged industrial wastes into the Hamilton Hydraulic Canal and the Greater Miami River. Such wastes included the pesticides endrin, dieldrin and heptachlor (all of which are carcinogenic). The complaint also charged the defendants had caused noxious odors injurious to public health and comfort.

After two years of negotiations, the parties arrived at a stipulation and judgment which was entered as a judicial decree on July 18, 1979 by the Butler County, Ohio Court of Common Pleas. The court's judgment pointed out that defendants estimated they had 850,000 gallons of liquid waste and 4000 barrels of solid or semisolid sludges stored on their property in Hamilton. App. 45. The court ordered these wastes to be removed within twelve months, at a net rate of 75,000 gallons of liquid and 340 drums of sludges per month. App. 46-47. Defendants were also enjoined from bringing additional industrial wastes onto the property. *Id.* at 48.

Kovacs and Chem-Dyne did not obey the court's order, and later in 1979 there were fires and explosions on the Chem-Dyne property.[5] Ohio then moved for the appoint-

[5] The fires and explosions caused injuries and created fireballs in the air. All of Hamilton, Ohio's fire and police units were called to the scene. *Cincinnati Post*, "Chem-Dyne Fire Injuries Reported," August 24, 1979.

ment of a receiver to carry out the court order of July 18, 1979. After hearing evidence and argument, the Butler County court found there was little if any net change in the inventory of waste on defendants' property, and that Kovacs had brought additional waste onto the premises. The court ruled that defendants had acted in "flagrant disregard" of its decree of July 18, 1979. App. 54.

Thus in early February of 1980 the court appointed a receiver to carry out the prior decree (App. 56), which defendants themselves had been supposed to carry out. Defendants were ordered to turn over their assets to the receiver for use in fulfilling their obligations under the July 18, 1979 decree. They also were ordered to cooperate fully with the receiver. *Appendix In Support of Petition for a Writ of Certiorari*, pp. 29, 34-35, 37, *Kovacs v. Ohio*, No. 82-815, vacated and remanded, 103 S.Ct. 810 (1983).

Kovacs then filed for bankruptcy. He did so in the summer of 1980.

By the fall of 1980, the receiver became aware that the assets turned over to him by defendants for use in fulfilling their court-ordered obligations were insufficient for the purpose. The state therefore requested the Butler County court to determine whether Kovacs possessed additional assets that properly should be administered by the receiver in order to complete the clean-up of hazardous materials at the Chem-Dyne property. The state also asked the Butler County court to inquire into Kovacs' employment status and income to determine whether he should provide further financial assistance pursuant to his court-ordered duty to cooperate with the receiver.

Kovacs then asked the bankruptcy court to stay proceedings in the Butler County court. The bankruptcy court did so, and was upheld by the federal district court and the Sixth Circuit. The Circuit Court held that the automatic stay provisions of the Bankruptcy Act (11

U.S.C. § 362) were applicable because in essence the state was seeking to collect a money judgment. This Court subsequently vacated and remanded the Sixth Circuit decision for consideration of the question of mootness.

Approximately one month after Kovacs requested a stay from the bankruptcy court, Ohio filed a petition in that court seeking a declaratory judgment that Kovacs' judicially-ordered obligation to remove all waste from the Hamilton site is not a "debt" dischargeable in bankruptcy. Though it recognized that "[w]hat is at stake . . . is whether defendant's bankruptcy will discharge the affirmative obligation imposed upon him by the Judgment Entry" of the Butler County court, the bankruptcy court nevertheless ruled for Kovacs. App. 21. It was affirmed by the federal district court. The Sixth Circuit then affirmed, essentially on grounds relied upon by the bankruptcy court. The Sixth Circuit said Ohio wished to use part of Kovacs' income to assist in the clean-up; was essentially seeking a money payment, since Kovacs could not personally clean up the wastes; and was asserting a claim or debt that is dischargable in bankruptcy. Like the bankruptcy court, the Sixth Circuit noted that Ohio had not invoked provisions of the bankruptcy code under which otherwise dischargable claims or debts are exempted from discharge (11 U.S.C. § 523).

SUMMARY OF ARGUMENT

1. The decision below gives rise to fundamental problems concerning the police powers of state and local governments. A crucial sovereign function of these governments is to protect the health and welfare of their citizens. The governments carry out this basic purpose of their police power by enacting environmental laws that preclude the improper discharge of dangerous substances and that require violators to cure their transgressions. These laws are enforced by injunctions.

The decision of the lower court injures the basic authority of state and local governments to protect their citizens against environmental hazards. It does so by preventing the state from obtaining Kovacs' cooperation in curing a dangerous situation that he himself created, by nullifying a state court injunction that he flagrantly disregarded, and by providing a blueprint under which environmental offenders can evade important consequences of their actions.

It is doubtful that Congress intended the results of the lower court's opinion. The Bankruptcy Act has no statutory language or legislative history showing that Congress intended to injure the sovereign police power under which states protect their citizens against hazards, or intended to undermine state court injunctions and the rule of law by enabling violators to evade injunctions. Rather than indicating any such intent, the Act has elements showing the contrary.

Furthermore, if the lower court's decision were correct, grave constitutional questions would arise concerning the authority of Congress to override the fundamental sovereign power of states to protect their citizens against serious environmental hazards and its authority to enable violators of valid state laws to avoid implementation of state court injunctions upholding those laws.

Such questions are fundamental in our federal system. However, it is a basic tenet of this Court's jurisprudence that such fundamental constitutional questions will not be decided unless the statute at issue cannot be interpreted in a manner that avoids them. The Bankruptcy Act can be so interpreted. Not only is there no indication that Congress intended the untoward consequences of the Sixth Circuit's opinion, but various provisions of the Act preclude interference with a state's exercise of governmental police and regulatory powers or with judgments enforcing those powers. Thus, this Court should reverse the Sixth Circuit's interpretation of the statute.

2. Kovacs' duty to obey the injunction cannot be discharged in bankruptcy because it is not a "debt" or "claim" within the meaning of the Bankruptcy Act.

The Act defines a "debt" or "claim" as involving a "right to payment" or "a right to an equitable remedy for breach of performance if such breach gives rise to a right to payment." Kovacs' duty to obey the injunction is not the kind of situation normally thought of as involving a "right to payment" or normally thought of as one in which an obligation can be satisfied or evaded by a "payment." It does not involve payments due under a contract or other private instrument, a commercial arrangement under which a person has a right to either specific performance or damages, or an arrangement in which the state is considered a creditor.

Instead, the case concerns a very different type of situation. Here a party violated state environmental laws, and then refused to obey a court order requiring him to cease his violations and to clean up extensive pollution he was causing. The party's actions forced the state to seek the appointment of a receiver, who stepped into the party's shoes to perform the party's own obligations. The receiver is *de facto* acting as the party himself. He is doing the very things the party is required to do, and is the party's alter ego for those purposes. In seeking to determine whether the party has additional assets or income which should be used to aid the receiver, the state is not acting as a creditor. Rather it is only attempting to determine whether Kovacs should make an additional contribution to the implementation of duties which he himself is required to carry out and which the receiver is simply carrying out for him. This is not the type of situation Congress had in mind when it said "debts" or "claims" can be discharged.

The contrary decision of the Sixth Circuit is erroneous. The lower court said the case involves a "debt" or "claim" because Ohio wants Kovacs to make a monetary

contribution to the clean-up. But since Kovacs could not clean up the pollution at the Chem-Dyne site with his own two hands, a monetary contribution is the only way he could carry out his duty to clean up the pollution. This is true regardless of whether Kovacs himself is implementing his duties or the receiver is doing so for him. Thus the need for Kovacs to pay money to carry out his duty cannot convert the duty into a "debt" or "claim."

The Sixth Circuit's reasoning is also erroneous for another, intimately related reason. If the need to pay money caused an equitable remedy to be a dischargeable "debt" or "claim," then all equitable remedies would be dischargeable except where a party could personally carry out the remedy with his own two hands. Such a result is contrary to the intent of Congress, which has specifically preserved the nondischargeability of numerous equitable remedies, including ones which uphold governmental police and regulatory powers.

Finally, the Sixth Circuit decision is wrong because it was heavily influenced by the fact that, had Ohio prevailed, it might have been able to levy on a portion of Kovacs' future earnings. Though the Bankruptcy Act does contain a policy of protecting such earnings, it also contains competing policies showing they can be reached in appropriate circumstances, particularly including situations in which important state laws have been violated. This is such a situation.

3. Even if Kovacs' duty to comply with the state court injunction were a claim or debt, his duty still should not be discharged. Rather, discharge should be denied under Section 523(a)(6) of the Act and by analogy to Section 523(a)(7) of the Act.

Section 523(a)(6) precludes discharge of a debt for willful and malicious injury to another entity. The facts show that Kovacs willfully and maliciously injured the state, natural resources, and property of Ohio.

Section 523(a)(7) precludes discharge of a "forfeiture" to a governmental unit, so long as the forfeiture is not compensation for "an actual pecuniary loss." Kovacs' duty to turn over assets and money to a court-ordered receiver obtained by the state to clean up Kovacs' pollution is analogous to a forfeiture of the assets and money to the state for this purpose, which is beneficial to the state and its people. Nor does Kovacs' duty involve compensation for "an actual pecuniary loss" as that term is commonly understood. The term ordinarily refers to losses arising from a breach of a contractual arrangement, or to losses flowing from the infliction of a tortious injury (*e.g.*, lost wages due to a car accident). This case involves no such situation; it involves only an effort to require a violator to remove the source of an injury he has caused.

ARGUMENT

I. The Sixth Circuit's Interpretation of the Bankruptcy Act Gives Rise to Grave Constitutional Questions and Should Be Eschewed by This Court

The decision of the court below gives rise to fundamental problems concerning the police powers of state and local governments. A crucial sovereign function of these governments is to protect the health and welfare of their citizens. The governments carry out this basic purpose of their police powers by enacting environmental laws that make it illegal to discharge dangerous or noxious substances into the air or water or to place them improperly on land. The governments also require violators of these laws to cure their violations. Injunctions prohibiting further violations, and requiring the clean-up of existing ones, are a vital enforcement tool used to secure adherence to laws and regulations protecting the environment and the public health and safety.

The decision of the lower court, however, strikes at the fundamental sovereign authority of state and local governments to protect their citizens against environmental hazards. It does so by preventing the state from obtaining further cooperation from Kovacs in curing a dangerous and noxious situation that he created in the pursuit of personal gain, and by overriding a state court injunction even though Kovacs transgressed the injunction by acting in "flagrant disregard" of it. Moreover, the lower court's decision provides a blueprint by which environmental offenders can evade important consequences of their actions. As stated by the Solicitor General in an *amicus curiae* memorandum supporting certiorari in this case, the decision below will harm the enforcement of environmental laws "by encouraging offenders to file for bankruptcy, and thereby excuse themselves from performing orders which require them to abate the health hazards they have created." *Memorandum for the United States as Amicus Curiae Supporting Petitioner*, p. 2.

The Sixth Circuit decision leading to these untoward results is premised on the view that the ruling below is required by an act of Congress, the Bankruptcy Act. But whether Congress intended the results of the lower court's opinion, or used statutory language leading to those results, is a very grave issue. It is doubtful that Congress intended to seriously hinder the sovereign power of states to protect their citizens against hazards, and intended to thereby injure the basic police power of the states under our federal system of government. *Amici* are unaware of any statutory language or legislative history showing such Congressional desire, and, as will be discussed *infra*, there are indications to the contrary.

Nor are *amici* aware of any legislative history or language showing Congress intended to enable violators of state law to avoid implementation of state court injunctions, and thereby intended to undermine sovereign authority and the rule of law. This Court itself has recognized that adherence to injunctions is a vital necessity of the rule of law, and has required obedience to injunctions

even when directed against oppressed minorities fighting for basic civil rights. *Walker v. City of Birmingham*, 388 U.S. 307 (1967). That Congress would have wished to undermine the authority of injunctions is dubious on its face, and is gainsaid by statutory language and legislative history discussed *infra*.

Furthermore, if the lower court's view of the Bankruptcy Act were correct, very serious constitutional questions would be presented. It would be necessary to determine whether Congress possesses the authority to impair the essential sovereign police power under which states protect their citizens against environmental hazards that threaten life and health. It would also be necessary to determine whether Congress has the authority to enable violators of valid state laws to avoid carrying out state court injunctions. Questions such as these are fundamental. They implicate the distribution of authority between the federal and state governments, and involve the issue whether Congress can override powers crucial to the functioning of state governments.

It is a wise and longstanding tenet of this Court's jurisprudence that such basic constitutional questions will not be decided unless the statute at issue cannot be interpreted in a manner that avoids them. *California v. Arizona*, 440 U.S. 59 (1979); *South Carolina v. Regan*, No. 94 Orig., O.T. 1983 (O'Connor, J., concurring), slip op. at 15. The Bankruptcy Act can readily be interpreted in such manner, however. Not only is there no indication that Congress intended the untoward results created by the Sixth Circuit's opinion, but there are statutory elements pointing in the opposite direction. These elements point to an intent to uphold essential state powers to govern.

For example, § 362 of the Act provides for automatic stays of a variety of actions upon filing of a bankruptcy petition, but it says there shall be no such stay of actions

brought by a governmental unit to enforce its police or regulatory powers. 11 U.S.C. § 362(b)(4). Nor shall there be an automatic stay of enforcement of a judgment obtained by a governmental unit in a proceeding to enforce its police or regulatory powers, unless the judgment is a money judgment. 11 U.S.C. § 362(b)(5). The House and Senate Reports both point out that under these provisions there is no automatic stay of governmental suits to prevent or stop violations of "fraud, environmental protection, consumer protection, safety or similar police or regulatory laws." H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 342-3 (1977); S. Rep. No. 95-989, 95th Cong., 2d Sess. 51-2 (1978).

Similarly, § 523 of the Act provides that there shall be no discharge of debts incurred as punishment for violations of state law rather than as compensation for a pecuniary injury. It thus says a debt is not discharged "to the extent . . . it is for a fine, penalty, or forefeiture payable to and for the benefit of a governmental unit, and is not compensation for an actual pecuniary loss." 11 U.S.C. § 523(a)(7).[9]

Section 523 also provides that there shall be no discharge for "willful and malicious injury" caused to another entity by the debtor, 11 U.S.C. § 523(a)(6), and the House and Senate Reports point out that "willful" means "deliberate or intentional." H.R. Rep. No. 95-595, *supra* at 363; S. Rep. No. 95-989, *supra* at 77-79. Deliberate and malicious harm to the state and its citizens is precisely what is caused when, like Kovacs, a party pollutes the air and water with hazardous substances and even does so in violation of a prohibitory injunction. Here again, therefore, the statute favors enforcement of important sovereign powers.

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[9] As described at pages 17-18, *infra*, Ohio is not seeking compensation for an "actual pecuniary loss."

Thus, this Court should adhere to its traditional jurisprudence and eschew an interpretation of the Bankruptcy Act that would raise grave constitutional questions concerning Congress' authority to override fundamental powers of states and to gravely weaken state court injunctions. Nothing in the statute supports such an unhappy interpretation of the law and there are statutory elements contrary to it.

II. Kovacs' Obligation to Obey the Butler County Court's Injunction and to Assist the Receiver Is Not a "Debt" or "Claim" Dischargeable in Bankruptcy

The specific point being urged by Ohio is that Kovacs' obligation to obey the Butler County court's injunction cannot be discharged in bankruptcy because it is not a "debt" or "claim." Ohio's position is supported by the Solicitor General.

Under Section 727(b) of the Bankruptcy Act, a party can be discharged from "debts" or from liability on "a claim." Debts and claims are defined as a "right to payment," or a "right to an equitable remedy for breach of performance if such breach gives rise to a right to payment." 11 U.S.C. §§ 101(11) and 101(4). Ohio argues that here there exists no "debt" or "claim" because Kovacs' duty to obey the injunction does not come within the intended meaning of the statutory definitions of these terms. Ohio says Congress did not intend the definitions to encompass a situation where a polluter's basic duty is to comply with an injunction requiring him to cease, and reverse, violations of environmental laws. Ohio adds that Kovacs' duty to cease and reverse his violations of law cannot be avoided by payments in lieu of the necessary action.

Amici believe Ohio's position is the sounder view, especially since the Court should eschew a contrary interpretation that would give rise to constitutional questions concerning Congress' authority to override fundamental state powers and state court injunctions.

This case does not involve the kind of situation normally thought of as involving a "right to payment," or normally thought of as one in which an obligation can be satisfied or evaded by a "payment." Thus, it does not implicate the type of situation falling within the definition of "debt" or "claim." The case does not involve a claim of payments due under a contract, deed of trust, or other private instrument. It does not concern a commercial arrangement in which both sides must perform, and, if one does not, the other has a right to damage payments, either absolutely or as an alternative to specific performance. It does not involve a situation in which a tortiously injured party seeks payment for damages inflicted upon it.[4] It does not concern some arrangement in which the state is ordinarily thought of as a creditor.

What this case does involve is a very different type of situation. This is a case in which a party committed civil or criminal violations of state environmental laws, and then refused to obey a court order requiring him to cease his violations and to clean up the extensive pollution he was causing. The state was therefore compelled to seek the appointment of a receiver, who stepped into the party's shoes in order to perform the party's own obligations. The receiver is *de facto* acting as the party himself. He is doing the very things the party is required to do. He is the party's alter ego for these purposes.

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[4] Ohio did seek such payment in its 1976-1979 proceedings against Kovacs, where it sought compensation for fish destroyed by unlawful pollution of waters. The decree of July 18, 1979 awarded the state $10,000 for this injury inflicted upon it. The state is not asserting that this money judgment is not a "debt" or "claim" within the meaning of the Bankruptcy Act. Thus, this case itself illustrates the difference between an attempt to secure adherence to an injunction that requires a polluter to clean up his pollution, and an attempt to secure damages for injury inflicted upon a party by the polluter.

Moreover, in seeking to determine whether the party has additional assets or income which should be used to aid the receiver, Ohio is not acting as Kovacs' creditor. Rather, it is only seeking to determine whether he should make an additional contribution to the implementation of duties which he himself is required to carry out and which the receiver is simply carrying out for him.

Thus, to reiterate, the case is not the type of situation Congress appeared to have in mind when it said "debts" or "claims" can be discharged.

The Sixth Circuit, however, erroneously held to the contrary, relying on the fact that Ohio wants Kovacs to make a monetary contribution toward the clean-up. But a monetary contribution is the only way Kovacs could carry out his duty to clean up the ongoing pollution. This is true regardless of whether Kovacs himself were implementing his duties, or the receiver, standing in his shoes, is implementing them for him. For as the Sixth Circuit recognized, "Kovacs cannot personally clean up the waste he wrongfully released into Ohio waters." The only way he can clean up these wastes is to pay money to others who have the necessary capacity. Thus, the payment of money by Kovacs does not convert his court-ordered duty into a statutory "debt" or "claim."

The Sixth Circuit's position is also wrong for another, intimately related reason. Ohio desires Kovacs to obey an injunction. Such obedience entails the expenditure of money. Because it does so, the Sixth Circuit asserts that the matter involves a statutory "debt" or "claim," rather than an equitable remedy. But numerous injunctions and other equitable remedies necessarily entail the expenditure of money by the party to whom the court order is directed. Indeed, they will do so in all cases except those in which the affected party is capable of carrying out the order with his own two hands. Thus, under the Sixth Circuit's reasoning, all equitable remedies will be dischargeable "debts" or "claims," except where a party can personally carry out the remedy. Such a result is contrary to the intent of Congress. For Congress has made clear in Section 101(4)(B) of the Act that an equitable remedy is not dischargeable unless it is for a breach that gives rise to an alternative right to payment, and has made clear in other sections of the Act that it does not intend to hamper state efforts to enforce police and regulatory laws, whose enforcement often occurs by means of injunctions and other equitable remedies. See pp. 10-11, supra.

Finally, the Sixth Circuit's ruling is in error for yet another reason. The Court's decision that Kovacs' obligation to comply with the injunction is a dischargeable debt or claim was heavily influenced by the fact that Ohio might otherwise be able to levy on a portion of Kovacs' future earnings. But though the Bankruptcy Act does contain a policy of protecting such earnings, it does not treat them as sacrosanct, and contains competing policies showing they can be reached in appropriate circumstances. Thus, there are numerous types of debts that are non-dischargeable though they normally or often are paid out of future earnings. They include debts for various taxes, debts for obtaining money or property by false pretenses or fraud, debts for defalcation as a fiduciary or for embezzlement or larceny, debts for causing willful and malicious injury, and debts for fines, penalties or forfeitures. 11 U.S.C. § 523.

The court below was therefore mistaken in placing great weight on the possibility of a levy on a portion of future income. Such levy is permitted when public policy requires. Public policy does so require when laws of the state have been violated, as is shown by the foregoing examples involving fraud, embezzlement, fines, penalties and taxes. In this case, too, important laws of the state have been violated, and a court injunction has been flagrantly disregarded as well. Thus, the possibility of a

levy on income is no basis for finding that Kovacs' duty to obey the injunction and assist the receiver is a dischargeable debt or claim.[6]

III. Even If Kovacs' Duty Were a Debt or Claim, Discharge Should Be Denied In Accordance With Statutory Provisions Preventing Discharge of Particular Types of Debts

Even if Kovacs' duty to comply with the orders of the Butler County court were a debt or claim, his duty still should not be discharged. Rather, *amici* submit, discharge should be denied under Section 523(a)(6) of the Act and by analogy to Section 523(a)(7) of the Act.[6]

Section 523(a)(6) provides that a party is not discharged from "any debt . . . for willful and malicious injury by the debtor to another entity or the property of another entity." If Kovacs' duty to obey the injunction

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[5] As noted above, the Sixth Circuit previously ruled that proceedings brought by Ohio in the Butler County court to enforce the injunction of July 18, 1979 are subject to the automatic stay provisions of Section 362 of the Bankruptcy Act. The Court of Appeals' decision was premised on the same reasoning as its decision on whether there is a dischargeable debt or claim: the court said the automatic stay provision applies because Ohio is seeking the payment of money. (In the words of Section 362, Ohio was said to be seeking "enforcement" of "a money judgment.") Thus, the reasons why the Sixth Circuit was mistaken in its assessment of whether a statutory debt or claim exists are also applicable to its assessment of whether the automatic stay provision was applicable. The latter assessment should be overruled if the Court's decision addresses the matter.

[6] This point has not been urged by Ohio, but its importance to the ability of state and local governments to enforce their environmental laws is equal to the importance of the question of debt or claim. The critical factor to state and local governments is that they be able to enforce their laws and supporting injunctions against polluters who seek to escape via a discharge in bankruptcy. Whether discharge is denied because there is no debt or claim, or because a debt or claim is undischargeable, is of less moment than that it be denied.

and assist the receiver is a debt, then it is a debt arising because Kovacs willfully and maliciously injured the state and property of Ohio. This is manifest on the facts.[7]

Kovacs was responsible for toxic and noxious substances entering the ground, the waters and the air of the state, thereby killing fish in the waters of the state and threatening the health and safety of citizens of the state. He continued his actions after being enjoined from doing so, thus acting in "flagrant disregard" of the injunction, causing the situation to worsen, and making it necessary for the Butler County court to appoint a receiver with whom Kovacs was ordered to cooperate. Kovacs' actions thus show that he willfully and maliciously harmed the state, its natural resources, and its property.[8]

Section 523(a)(7) provides that a debt is not discharged to the extent it "is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss." Kovacs' duty to turn over money and assets to a court-ordered receiver obtained by the state to clean up Kovacs' pollution is analogous to a forfeiture of the money and assets to the state for such purpose, a purpose beneficial to the state and its people. Nor does the duty involve compensation "for actual pecuniary loss" as that term is commonly understood. The term ordinarily applies to losses arising because of a failure to adhere to some

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[7] The requirements that injury be caused "willfully" and "maliciously" are both satisfied if a party acted deliberately or intentionally, and in flagrant disregard of his duties. 3 Collier on Bankruptcy (15th ed.), § 532.16. Kovacs did so, as shown below.

[8] We further note that, even if Kovacs had not caused willful and malicious injury, his discharge still would not relieve him from liability for injury which he caused *after* the discharge. Such injury occurs every day as a result of his failure to clean up the pollution he caused. The pollution continues to infest the ground, waters and air, with consequent continuing harm to the state and its people.

contractual arrangement, or to losses flowing from the infliction of a tortious injury (*e.g.*, to a loss of wages due to a car accident). This case involves no such situation; it involves only an effort to require a violator to aid in removing the source of an injury he has caused.

Finally, nondischargeability is permissible though it arises by analogy rather than expressly. In other cases, *e.g.*, ones involving criminal restitution, there is no express statutory exception to discharge, but judicial orders have nonetheless been held nondischargeable because of public policy. See *In re Tauscher*, 7 B.R. 918 (E.D. Wisc. 1981); *In Re Thomassen*, 1[illegible] B.R. 907 (Bkrtcy. App. 1981). Public policy requires nondischarbeability here also.

CONCLUSION

For the foregoing reasons, the decision of the court below should be reversed.

Respectfully submitted,

LAWRENCE R. VELVEL
Chief Counsel
JOYCE HOLMES BENJAMIN
Attorney
State and Local Legal Center
444 N. Capitol Street, N.W.
Suite 349
Washington, D.C. 20001
(202) 638-1445
Counsel for the Amici Curiae

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AMICUS CURIAE

BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

IN RE: WILLIAM LEE KOVACS,
Debtor,

and

STATE OF OHIO,
Petitioner-Appellant,

v.

WILLIAM LEE KOVACS, d/b/a B&W ENTERPRISES; HAMILTON INDUSTRIAL REAL ESTATE COMPANY; RESORT RENTALS; and WHITCO ENTERPRISES,
Respondent-Appellee.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF COMMONWEALTH OF PENNSYLVANIA AND THIRTY-ONE STATES AS AMICI CURIAE IN SUPPORT OF REVERSAL

LEROY S. ZIMMERMAN
Attorney General of Pennsylvania by

HOWARD J. WEIN *
Assistant Counsel
Highland Building
121 South Highland Avenue
Pittsburgh, PA 15229
(412) 665-4940

JAMES D. MORRIS
Assistant Counsel
12th Floor
1314 Chestnut Street
Philadelphia, PA 19107
(215) 875-7486

* Counsel of Record for *Amici Curiae*

WILSON - EPES PRINTING CO., INC. - 783-0096 - WASHINGTON, D.C. 20001

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IN THE

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On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF COMMONWEALTH OF PENNSYLVANIA AND THIRTY-ONE STATES AS AMICI CURIAE

THE INTEREST OF THE *AMICI CURIAE*

The *amici curiae* are the Attorneys General of the Commonwealth of Pennsylvania and the states of Alaska, California, Colorado, Connecticut, Delaware, Idaho, Illinois, Indiana, Kansas, Louisiana, Maine, Michigan, Minnesota, Missouri, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee,

Texas, Vermont, Virginia, Washington, West Virginia and Wisconsin, which file this brief pursuant to Rule 36.4 of the Rules of the Supreme Court of the United States. In each of the *amici* states, the governors and the state legislatures have developed or are developing comprehensive statutory and regulatory programs for assuring the public health, safety and welfare by protecting the environment.[1] These programs constitute a valid exercise of the police power reserved to the various states. The cornerstone of each such program is the sovereign state's right to institute legal actions requiring the abatement of hazards to the public health and safety caused by violations of the various state environmental statutes and regulations.[2] For the second time in this matter,[3] the United States Court of Appeals for the Sixth Circuit has misconstrued the Bankruptcy Reform Act of 1978, 11 U.S.C. § 1 *et seq.* ("Bankruptcy Code"). The Sixth Circuit's decision strikes a devastating blow to the *amici*

[1] Pennsylvania's statutes are illustrative of the comprehensive program of environmental protection established by the various states. Each statute is designed to address a particular area of concern. The Act of June 22, 1937, P.S. 1987, 35 P.S. § 691.1 *et seq.* (1982-1983 Supp.) (Pennsylvania Clean Streams Law—Water pollution); The Act of January 8, 1960, P.L. 2119, as amended, 35 P.S. § 4001 *et seq.* (Pennsylvania Air Pollution Control Act—Air Pollution); the Act of July 7, 1980, P.L. 380, No. 97, 35 P.S. § 6018.101 *et seq.* (1982-1983 Supp.) (Pennsylvania Solid Waste Management Act—Solid Waste); the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. § 1396.1 *et seq.* (1982-1983 Supp.) (Pennsylvania Surface Mining Conservation and Reclamation Act—Surface Mining); The Act of April 9, 1929, P.L. 177, as amended, 71 P.S. § 510-17 (1982-1983 Supp.) (The Administrative Code of 1929—Abatement of Nuisances).

[2] Illustrative are the provisions in the Pennsylvania statutes, i.e., Section 601 of the Clean Streams Law, *supra*, 35 P.S. § 691.601; Section 10 of the Air Pollution Control Act, *supra*, 35 P.S. § 4010; Sections 603 and 604 of the Solid Waste Management Act, *supra*, 35 P.S. §§ 6018.603 and 6018.604; and Section 18.2 of the Surface Mining Conservation and Reclamation Act, *supra*, 52 P.S. § 1396.20.

[3] *See In Re Kovacs*, 681 F.2d 454 (6th Cir. 1982), vacated and remanded for further consideration, —— U.S. ——, 103 S.Ct. 810 74 L.Ed.2d 1010 (1983).

when they seek to protect the environment and the public health and safety through the exercise of the police power.

In *In Re Kovacs*, 681 F.2d 454 (6th Cir. 1982) ("*Kovacs I*") the Sixth Circuit held that the automatic stay provision of Section 362(a) of the Bankruptcy Code, 11 U.S.C. § 362(a), applied so as to preclude the State of Ohio from continuing an action in state court to enforce its police power against an illegal disposer of hazardous waste. This Court granted Ohio's Petition for Certiorari from the Sixth Circuit's decision in *Kovacs I* and on January 25, 1983, vacated the judgment and remanded the case to the United States Court of Appeals for the Sixth Circuit to consider the question of mootness. —— U.S. ——, 103 S.Ct. 810, 74 L.Ed.2d 1010 (1983). The Sixth Circuit has yet to consider expressly the question of mootness.[4]

After this Court's remand, the Sixth Circuit held that a debtor's obligation to abate the public health hazard posed by the illegal disposal of highly hazardous waste constitutes a claim within the meaning of Section 101(4) of the Bankruptcy Code, 11 U.S.C. § 101(4). The Sixth Circuit concluded that the claim constituted a debt within the meaning of Section 101(11), 11 U.S.C. § 101(11), which in turn is dischargeable in bankruptcy under Section 727(b) of the Bankruptcy Code, 11 U.S.C. § 727(b). *In Re Kovacs*, 717 F.2d 984 (6th Cir. 1983) ("*Kovacs II*"). In essence, the Sixth Circuit's decision, if upheld, will prevent the *amici* from enforcing state environmental protection laws against violators who have sought the shelter of the Bankruptcy Code, no matter how great the immediate danger to the public health and safety from those violations. The Sixth Circuit's decision enables violators of state environmental laws to avoid all legal responsibility for the abatement of ongoing pub-

[4] *See* Appendices in Support of Petition for Writ of Certiorari at n.3, p. A-5 and n.5, p. A-7.

lic nuisances and health hazards by securing a discharge in bankruptcy.

The common interest of the *amici* lies in the preservation of their ability to protect the citizenry through enforcement of state police power enactments. They also seek to vindicate the Congressional intent that the Bankruptcy Code not be used to subvert the legitimate interest of the states in seeking the abatement of hazards and nuisances which threaten the public health, safety and welfare. The *amici* are increasingly concerned that lower federal courts are allowing bankrupts to subvert these important state interests.

In recent years, Congress also has recognized the importance of protecting the same interests served by the state environmental protection statutes.[4] The comprehensive regulatory scheme enacted by Congress is designed to protect against, *inter alia*, existing and past unlawful hazardous waste disposal activities and includes provisions for state enforcement of various federally imposed requirements. If the Sixth Circuit's decision is allowed to stand, that scheme could be impaired severely. The *amici* also have an interest in protecting the effectiveness of the Federal programs and the ability of the states to enforce the provisions of those programs.

SUMMARY OF ARGUMENT

The Sixth Circuit's decision erroneously holds that the obligation of a bankrupt to comply with state police power enactments constitutes a "claim" which gives rise to an ordinary debt which in turn is dischargeable in bankruptcy. By precluding state law enforcement against such a bankrupt, this decision thwarts Congressional intent, evidenced in the Bankruptcy Code and federal environmental protection statutes, to preserve the states' ability to maintain such enforcement actions. This decision is contrary to well-reasoned decisions of the United States Court of Appeals for the Third Circuit, interferes with states' ability to exercise their police power, and jeopardizes states' ability to enforce criminal laws.

[4] *See, e.g.*, the Clean Air Act, 42 U.S.C. § 7401; The Clean Water Act, 33 U.S.C. § 1251; The Resource Conservation and Recovery Act, 42 U.S.C. § 6901; The Federal Surface Mining Control and Reclamation Act, 30 U.S.C. § 1201; The Comprehensive Environmental Response, Compensation and Liability Act (Superfund legislation), 42 U.S.C. § 9601.

ARGUMENT

The Sixth Circuit erred in holding that the obligation of a debtor in bankruptcy to comply with state police power enactments constitutes an ordinary debt which is dischargeable in bankruptcy, thereby precluding state law enforcement against such a debtor.

The Sixth Circuit specifically held that the obligation of a debtor in bankruptcy to comply with state police power enactments amounts to nothing more than an ordinary debt, routinely dischargeable in bankruptcy. This decision effectively precludes state law enforcement against such debtors, in contravention of the Bankruptcy Code.

The Sixth Circuit has erroneously ruled that Ohio somehow acquired a "claim" cognizable in bankruptcy pursuant to 11 U.S.C. § 101(4) simply because it moved to enforce a properly promulgated Ohio law concerning the regulation of hazardous waste.[5] The Sixth Circuit

[5] The implicit view of the Congress was that state enforcement actions pursuant to the police power were not cognizable "claims" in bankruptcy and were therefore exempt, for example, from such code provisions as those relating to the automatic stay, 11 U.S.C. § 362. *See* Senate Report No. 95-989 at p. 51; House Report No. 95-595 at pp. 174-175, which provides as follows:

> *Under present law, there has been some overuse of the stay in the area of governmental regulation. For example, in one Texas bankruptcy court, the stay was applied to prevent the State of Maine from closing down one of the debtor's plants that was polluting a Maine river in violation of Maine's envi-*

in turn concluded that this "claim" gave rise to a dischargeable "debt" within the meaning of the Bankruptcy Code, because "debt" is simply defined in code terms as "liability on a claim," 11 U.S.C. § 101(11). The critical factor in any analysis of the instant case is thus whether Ohio had a "claim" cognizable in bankruptcy. The Sixth Circuit, in readopting the analysis of its prior vacated decision in this case,[7] wrote "that Ohio is essentially seeking to obtain a money payment from Kovacs." [8] Utilizing this flawed analysis, the Sixth Circuit improperly characterized Ohio's injunctive action as a "claim" giving rise to a "debt" owed by Kovacs to Ohio, and thereby concluded that Ohio is really seeking enforcement of a money judgment rather than a valid injunction pursuant to Ohio law. Such a result cannot be justified under the Bankruptcy Code.

When the Congress defined the term "claim" in the Bankruptcy Code, it did not include in that definition

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vironmental protection laws. In a Montana case, the stay was applied to prevent Nevada from obtaining an injunction against a principal in a corporation who was acting in violation of Nevada's antifraud consumer protection laws. *The bill excepts these kinds of actions from the automatic stay. The States will be able to enforce their police and regulatory powers free from the automatic stay. The Bankruptcy court has ample additional power to prevent damage to the bankrupt estate by such actions on a case-by-case basis.* By exempting these State actions from the scope of the automatic stay, *the court will be required to examine the State actions more carefully, and with a view to protecting the legitimate interests* of the State as well as of the estate, before it may enjoin actions against the debtor or the estate. (Emphasis supplied; footnotes omitted)

[7] *In re Kovacs*, 681 F.2d 454 (6th Cir. 1982), *vacated and remanded*, 103 S. Ct. 810 (1983).

[8] Decision of the United States Court of Appeals for the Sixth Circuit, *State of Ohio, et al. v. William Lee Kovacs, et al.*, Case No. 83-3629 (September 22, 1983), reported at 717 F.2d 984, Appendix A-1 at p. A 10, Appendicies in Support of Petition for Writ of Certiorari.

the sort of equitable relief which Ohio sought against Kovacs. Rather, the Congress provided that where an equitable remedy is involved, a "claim" giving rise to a dischargeable "debt" exists *if and only if* breach by failure to perform an obligation results in *both* a cause of action seeking to compel performance *and* an alternative "right to payment". *See* 11 U.S.C. § 101(4)(B). Under such circumstances, the Congress has made it clear that the entity holding such a claim must rely on its "alternative right to payment" rather than, *e.g.*, seeking specific performance of the contract.[9]

Ohio (and other states similarly situated) does not have this sort of monetary "claim" at all. Ohio has no "alternative right to payment" from Kovacs.[10] The Sixth

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[9] In the various decisions below, the Sixth Circuit has implicitly assumed that this language is *prima facie* applicable to police power enforcement proceedings pursuant to state law. Such an assumption is erroneous. Given the essentially commercial nature of the subject matter of that which is traditionally considered bankruptcy law, it would be far more reasonable to assume that the definition of "claim" is oriented *exclusively* towards the adjustment of ordinary contractual disputes including, *e.g.*, repayment of monies owed or delivery of promised goods. The legislative history of the Code reveals no Congressional intent to treat state police power equity proceedings as though they were posited upon a commercial contract providing for liquidated damages as an alternative to specific performance, which is precisely the sort of contractual question at which § 101(4)(B) of the Bankruptcy Code is aimed. To the extent the Congress chose to deal with such state police power concerns, it did so in other provisions of the Code, *e.g.*, § 362(b)(4), § 362(b)(5), and of the Judicial Code, *e.g.*, 28 U.S.C. §§ 959(b) and 1478.

[10] In a recent article published in the American Bankruptcy Law Journal (the Quarterly Journal of the National Conference of Bankruptcy Judges), the scope and nature of "claims" under the Bankruptcy Code were thoughtfully reviewed by Timothy B. Matthews. His analysis suggests strongly that legal rights such as those held by Ohio against Kovacs are simply not "claims" at all under the Bankruptcy Code, or, in Matthews' terminology, constitute "non-claims". *See* Matthews, The Scope of Claims Under the Bankruptcy

Circuit's analysis leads one to conclude that Kovacs, by paying off Ohio with some sum of money (or through his discharge in bankruptcy), can continue to escape his obligation pursuant to validly enacted state law to clean up the public nuisance and health hazard against which Ohio had directed its original action in equity seeking injunctive relief. In Pennsylvania, as in numerous other jurisdictions, a party cannot buy the right to pollute or to cause and maintain a public nuisance.[11] Following the Sixth Circuit's reasoning, a debtor who has seriously degraded the environment and threatened the public health by illegally dumping hazardous waste can acquire—for the price of a Petition for Relief—the right to maintain that public nuisance in perpetuity. Clearly, the object of a "fresh start" for Kovacs must not come at the expense of the citizens of Ohio.

The Third Circuit has on two recent occasions concluded that a governmental request for injunctive relief in no way approximated a demand for money damages, or for "enforcement of a money judgment". Most recently, in *Penn Terra Limited v. Department of Environmental Resources, et al.*, No. 83-5448, (Op. filed April 30, 1984), the Third Circuit reversed a District Court order affirming a Bankruptcy Court's finding of contempt against the Department of Environmental Resources

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Code, 57 *American Bankruptcy Law Journal*, Summer 1983, 221-246 (First Installment) and 57 *American Bankruptcy Law Journal*, Fall 1983, 339-383 (Second Installment), at 242, 244, 245 and 350-351.

[11] *Commonwealth v. Barnes & Tucker Company*, 455 Pa. 392, 319 A.2d 871 (1973); *Freitas v. City of Atwater*, 196 C.A.2d 280, 16 Cal. Rptr. 397 (1961); *People v. Perez*, 192 Colo. 562, 561 P.2d 7 (1977); *Midwest Investment Company v. City of Chariton*, 248 Iowa 407, 80 N.W.2d 906, 908 (1957); *Lillier v. State Highway Administration*, 25 Md. App. 276, 333 A.2d 644 (1975); *State ex rel. Board of Health of Saddlebrook Township v. Sommers Rendering Company*, 66 N.J. Super. 234, 169 A.2d 165 (1961). 66 *Corpus Juris Secundum* Nuisances § 92: "There is no such thing as a prescriptive right to maintain a public nuisance."

("DER") of the Commonwealth of Pennsylvania. DER had sought an injunction compelling a bankrupt strip mining company to comply with an administrative order requiring the company to abate certain violations of Pennsylvania law at its mines. Both the Bankruptcy and District Courts had determined that Pennsylvania's state court equity action amounted to no more than an effort to enforce a money judgment against the bankrupt, just as the lower courts in the instant case treated Ohio's Stipulation and Judgment Entry. Accordingly, the Bankruptcy Court adjudicated the Commonwealth in contempt for violating the automatic stay provisions of 11 U.S.C. §§ 362(b)4 and (b)5, and levied a substantial fine against the Commonwealth.

The Third Circuit reversed, noting that:

> At least as a matter of form, it is clear to us that the proceeding initiated by DER in Commonwealth Court was not to enforce a money judgment. Indeed, it could not have resulted even in the mere entry of a money judgment. DER brought its action in equity to compel certain remedial acts by Penn Terra. It did not seek the payment of compensation to Commonwealth coffers, and the injunction actually issued by the Commonwealth Court did not direct such payment. This proceeding, therefore, could never have resulted in the adjudication of liability for a sum certain, an essential element of a money judgment. Since this action was in form and substance . . . not one to obtain a money judgment, it follows that it could not be one to *enforce* the payment of such a judgment. Op. at 17-18.

The Third Circuit proceeded to analyze correctly the distinction between governmental requests for injunctive relief and claims for money damages:

> In *United States v. Price*, 688 F.2d 204 (3d Cir. 1982), this Court held that an order requiring the owner of a landfill to conduct a diagnostic study of the toxic hazards emanating from its property was

a proper use of the court's equitable powers, even though it required expenditure of money. The Court noted:

> We do not agree that *Jaffee*[11] leads to the conclusion that, in this case, plaintiff's request for an injunction was actually a claim for damages. *Damages are awarded as a form of substitutional redress. They are intended to compensate a party for an injury suffered or other loss.* A request for funds for a diagnostic study of the public health threat posed by the continuing contamination and its abatement is not, in any sense, *a traditional form of damages.* The funding of a diagnostic study in the present case, though it would require monetary payments, would be preventive rather than compensatory. The study is intended to be the first step in the remedial process of abating an existing but growing hazard which, if left unchecked will result in even graver future injury, *i.e.*, the contamination of Atlantic City's water supply. . . . The fact that an injunction may require the payment or expenditure of money does not necessarily foreclose the possibility of equitable relief. . . .
>
> It is not unusual for a defendant in equity to expend money in order to obey or perform the act mandated by the injunction. Injunctions, which by their terms compel expenditures of money, may similarly be permissible forms of equitable relief. Id. at 212 (emphasis added). Op. at 18-20.

The Third Circuit specifically recognized that "the very nature of injunctive relief is that it addresses injuries which may not be compensated by money," Op. at 21. The Third Circuit specifically opined that the definition of "money judgment" implied in *Kovacs II* was "unduly broad," Op. at 22 and concluded that:

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[11] *Jaffee v. United States*, 592 F.2d 712 (3d Cir. 1979).

> We believe that the inquiry is more properly focused on the nature of the injuries which the challenged remedy is intended to redress—including whether plaintiff seeks compensation for past damages or prevention of future harm—in order to reach the ultimate conclusion as to whether these injuries are traditionally rectified by a money judgment and its enforcement. Here, the Commonwealth Court injunction was, neither in form nor substance, the type of remedy traditionally associated with the conventional money judgment. It was not intended to provide compensation for past injuries. It was not reduceable to a sum certain. No monies were sought by the Commonwealth as a creditor or obligee. The Commonwealth was not seeking a traditional form of damages in tort or contract, and the mere payment of money, without more, even if it could be estimated, could not satisfy the Commonwealth Court's direction to complete the backfilling, to update erosion plans, to seal mine openings, to spread topsoil, and to implement plans for erosion and sedimentation control. Rather, the Commonwealth Court's injunction was meant to prevent future harm to, and to restore, the environment. Indeed, examining the state order, it is clear that erosion control, backfilling, and reseeding were additionally meant to preserve the soil conditions from further deterioration (as well as to rectify a safety hazard.) Op. at 24.

This case cries out for the same approach as that taken by the Third Circuit in *Penn Terra* and *Price*. Neither the Bankruptcy Court nor the Sixth Circuit found that a threat of grave "future injury" no longer exists.[12] Nor did they find that there is no need to protect against "*future* harm".[13] Such a threat clearly exists, and there

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[12] *United States v. Price*, 688 F.2d 204, 212 (3d Cir. 1982).

[13] *Penn Terra Limited v. Department of Environmental Resources, et al.*, No. 83-5448, 3d Cir., Op. at 21, filed April 30, 1984.

remains the need to protect against future harm.[16] The Ohio court should be permitted to proceed unfettered by the federal bankruptcy system in the attempt to compel the bankrupt Kovacs to comply with Ohio's police power enactments,[16] by abating the hazard he has caused.

Beyond the immediate interference with Ohio's ability to exercise its police power against Kovacs, the Sixth Circuit's reasoning produces two other deleterious consequences for Ohio and the other states. The Sixth Circuit's decision will stimulate unwarranted intrusions by the federal courts in legitimate state law enforcement proceedings in derogation of principles of comity and federalism. *See Younger v. Harris*, 401 U.S. 37 (1971) and *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975). The Sixth Circuit has forestalled a potential state criminal prosecution against Kovacs by discharging Kovacs from his obligation to obey Ohio law. Were the Ohio court to proceed unimpeded by the federal bankruptcy court, the

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[15] *See* Reply Brief of Ohio and Joint Appendix at pp. JA-33 through JA-35.

[16] There is no question that the bankrupt Kovacs is under an absolute obligation to comply with state police power enactments. Section 959(b) of Title 28 of the United States Code provides in pertinent part that:

> . . . a trustee, receiver or manager appointed in any cause pending in any court of the United States, including a debtor in possession, shall manage and operate the property in his possession as such trustee, according to the requirements of the valid laws of the state in which the property is situated, in the same manner that the owner or possessor thereof would be bound to do so if in possession thereof.

This provision constitutes a Congressional recognition that actions such as Ohio's in this case issue pursuant to the police power, traditionally recognized as the least limitable of the powers reserved to the states under the Tenth Amendment, *Quevenido Hills Realty v. Saul*, 328 U.S. 80 (1946), and enjoy a particular insulation from interference by federal insolvency proceedings. This Court upheld the applicability of § 959(b) in *Gillis v. California*, 293 U.S. 62 (1934).

Ohio court might well determine that Kovacs' acts and omissions (including those occurring prior to his institution of bankruptcy proceedings) respecting its various orders were clearly contemptuous. If the contempt were criminal, the Sixth Circuit, by discharging Kovacs' statutory obligations to Ohio, has precluded the Ohio court from trying Kovacs criminally for willful violations of its orders and leaving the Ohio court (and all other state courts confronted by similar debtors presenting similar facts) powerless to protect its authority by punishing for contempt. This Court has made it clear that the federal courts may not interfere with state criminal proceedings except under the most extraordinary circumstances, *Younger v. Harris*, 401 U.S. 37 (1971). Indeed, this Court has taken a similar position respecting civil litigation pursuant to an Ohio nuisance statute, *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975).[17] The state's interest in nuisance litigation is likely to be every bit as great as it would be in a criminal proceeding.[18] These considerations emphasize the unwarranted intrusiveness of the Sixth Circuit's holding.

In addition, certain states have laws which require the analysis of *prior* compliance history by applicants seeking permission to process or dispose of hazardous waste within the state.[19] By discharging Kovacs' state law obligation, the Sixth Circuit prevents a state from considering Kovacs' conduct in Ohio when weighing the decision whether to permit him to engage in the business of hazardous waste processing, disposal or transportation within

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[17] *See also* Wein, Environmental Regulation and the Bankruptcy Act, 17 *Duq. L. Rev.* 133, 137-138 (1978-1979). This appropriate spirit of extreme restraint by federal courts invited to interfere in legitimate state court proceedings is reflected as well in the federal Anti-Injunction Act, 28 U.S.C. § 2283.

[18] *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 604 (1975).

[19] *See* 35 P.S. §§ 6018.503(c) and 503(d) (Pennsylvania); NJSA 13; 1E-126 *et seq.* (New Jersey).

the state, since such past conduct respecting discharged obligations *cannot* be considered in light of the antidiscrimination clause of the Bankruptcy Code, 11 U.S.C. § 525.[20] Kovacs' fresh start in life was not intended by Congress to include a broad-scale exemption from the effects of his poor performance in the waste disposal business. Yet this is precisely the result to the Sixth Circuit's reasoning: one of the least desirable candidates for operation of a hazardous waste disposal site is shielded from regulatory consideration of his past conduct by the improper interposition of federal bankruptcy protection.

The Congress has enacted a comprehensive statute regulating the mining of coal[21] which also requires the analysis of prior compliance history as a precondition to the issuance of permits for mining.[22] Since the reasoning of the Sixth Circuit allows for the discharge of statutory obligations, it likewise subverts the express Congressional

[20] Section 525, 11 U.S.C. § 525, provides in pertinent part that:

> ". . . a governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to, discriminate with respect to such a grant against, deny employment to, terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor under this title or a bankrupt or a debtor under the Bankruptcy Act, or another person with whom such bankrupt or debtor has been associated, solely because such bankrupt or debtor is or has been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act, has been insolvent before the commencement of the case under this title, or during the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act."
>
> The term "governmental unit" is specifically defined to include the states and departments, agencies and instrumentalities of the states, 11 U.S.C. § 101(21).

[21] The Federal Surface Mining Control and Reclamation Act, 30 U.S.C. § 1201 *et seq.*

[22] *See* 11 U.S.C. § 1260(c).

intent with respect to the regulation of coal mining in the United States. Moreover, pursuant to the delegation scheme[23] contained in the federal statute, many of the coal-mining states have enacted statutes containing provisions with the same effect as 30 U.S.C. § 1260(c),[24] thereby implementing federal legislative action. Consequently, the Sixth Circuit's decision allowing the discharge of such statutory obligations disrupts the constitutional scheme protecting both the police power of the states and the power of the federal government to regulate interstate commerce.

In order to permit Ohio and the other states to protect their citizens against depredations such as Kovacs' through the institution of state law enforcement proceedings, the decision of the Sixth Circuit should be reversed.

[23] *See* 30 U.S.C. §§ 1253 and 1254.

[24] *See, e.g.*, 52 P.S. § 1396.32(b); 35 P.S. § 691.609.

CONCLUSION

Because the Sixth Circuit's decision below allows the discharge of statutory obligations, it effectively precludes the enforcement of state laws protecting the public health, safety and welfare against bankrupts. The Sixth Circuit's decision in this case should, therefore, be reversed.

Respectfully submitted,

LEROY S. ZIMMERMAN
Attorney General of Pennsylvania
1641 Strawberry Square
Harrisburg, PA 17120
(717) 787-3391

HOWARD J. WEIN *
Assistant Counsel
Pennsylvania Department of
Environmental Resources
1303 Highland Building
121 South Highland Avenue
Pittsburgh, PA 15206-3988
(412) 665-4940

JAMES D. MORRIS
Assistant Counsel
Pennsylvania Department of
Environmental Resources
12th Floor
1314 Chestnut Street
Philadelphia, PA 19107
(215) 875-7486

* Counsel of Record for
Amici Curiae

PETITIONER'S

BRIEF

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CASE NO. 83 – 1020

In The Supreme Court of the United States

OCTOBER TERM, 1983

IN RE: WILLIAM LEE KOVACS,
Debtor

STATE OF OHIO,
Petitioner-Appellant,

v.

WILLIAM LEE KOVACS, d/b/a, B & W Enterprises; Hamilton Industrial Real Estate Company; Resort Rentals; and Whitco Enterprises,
Respondent-Appellee.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF PETITIONER

ANTHONY J. CELEBREZZE, JR.
Attorney General of Ohio

E. DENNIS MUCHNICKI
Assistant Attorney General

State Office Tower
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
(614) 466-2766

Counsel of Record for Petitioner

BEST AVAILABLE COPY

QUESTION PRESENTED FOR REVIEW

1. WHETHER A DEBTOR'S CONTINUING OBLIGATION TO COMPLY WITH AN INJUNCTION ISSUED BY A STATE COURT REQUIRING A CLEANUP OF A HAZARDOUS WASTE STORAGE SITE AND ABATEMENT OF THE THREAT TO PUBLIC HEALTH AND SAFETY PRESENTED BY THAT SITE IS A "DEBT" OR "CLAIM" SUSCEPTIBLE TO DISCHARGE IN BANKRUPTCY.

PARTIES TO THE PROCEEDINGS BELOW

The petition to this court for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit was sought by the State of Ohio on the relation of its Attorney General, Anthony J. Celebrezze, Jr. The State was a party to an adversary proceeding before the bankruptcy court for the Southern District of Ohio which court issued a decision holding that Kovacs' obligation to comply with an injunction issued by the Butler County Court of Common Pleas requiring him to remove all hazardous waste from the Chem-Dyne site in Hamilton, Ohio, was a "claim" or "debt" which was subject to discharge in bankruptcy. The State was the appellant in the proceeding in the Sixth Circuit. William Lee Kovacs, d/b/a, B & W Enterprises, Hamilton Industrial Real Estate Company, Resort Rentals and Whitco Enterprises, (hereinafter "Kovacs" or "Debtor") is the debtor in the bankruptcy case. Nominally named as a plaintiff in the adversary complaint which was filed in the bankruptcy court by the State of Ohio is Jack Zettler, the receiver appointed by the state court to supervise the implementation of its cleanup order, and nominally named as a defendant is E. Hanlin Bavely, the bankruptcy trustee. Neither Bavely nor Zettler has filed any pleadings in appeals from the bankruptcy court's determination of dischargability, although Zettler has orally indicated his concurrence with the State of Ohio's position.

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A. Resnick and E. Wypski, *Bankruptcy Reform Act of 1978: A Legislative History* (1979).....14, 15, 16, 17, 18, 29, 30

Mathews, "The Scope of Claims Under The Bankruptcy Code", 57 *American Bankruptcy Law Journal*, Summer 1983, pp. 221-246 (First Installment) and 57 *American Bankruptcy Law Journal*, Fall 1983, pp. 339-383 (Second Installment) 20

OPINIONS BELOW

The opinion of the Sixth Circuit in *State of Ohio v. Kovacs* is reported at 717 F.2d 984 (6th Cir. 1983), and is set out for the Court's convenience in Appendix A. The decision of the district court affirming the bankruptcy court is not reported. The bankruptcy court's original decision that the obligation to comply with the state court injunction was dischargeable is set forth at 29 W.B.R. 816 (Bkrtcy. S.D. Ohio, 1982). The district and bankruptcy court opinions are set forth for this Court's convenience in Appendices B and C.

JURISDICTION

The judgment of the Court of Appeals was entered on September 22, 1983. The jurisdiction of this Court to review that judgment is invoked pursuant to 28 U.S.C. Section 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The case involves an interpretation of the terms "debt" and "claim" as defined in the Bankruptcy Reform Act of 1978, 11 U.S.C. Section 101(4) and (11), as they relate to the scope of discharge established by the Bankruptcy Code, 11 U.S.C. Section 727(b). The relevant provisions of the Bankruptcy Act of 1978 are set forth in Appendix J.

STATEMENT OF THE CASE

Nature of the Case

This case is the companion case to *State of Ohio v. Kovacs*, 681 F. 2d 454 (6th Cir. 1982), vacated and remanded for further consideration, ____ U.S. ____, 103 S.Ct. 810 (1983) (hereinafter "*Kovacs I*"), which was before this Court last year. In *Kovacs I* Ohio had petitioned to this Court from the Sixth Circuit's holding that Ohio's efforts to enforce an injunction obtained in state court requiring Debtor Kovacs to abate the threat to public health and safety presented by the hazardous chemical waste stored at the Chem-Dyne site in Hamilton, Ohio, was subject to the automatic stay of the Bankruptcy Code, 11 U.S.C. Section 362. In responding to that petition Debtor Kovacs argued that the stay appeal was moot because the district court had recently affirmed the bankruptcy court's determination that Kovacs' obligation to comply with the injunction was dischargeable in bankruptcy. In reply, Ohio argued that its petition was not moot because the bankruptcy court's determination of dischargeability was erroneous and could be reversed in the appeal from that decision which Ohio had recently filed with the Sixth Circuit. This Court granted Ohio's petition, vacated the Sixth Circuit's decision, and remanded for consideration of mootness in light of the pending dischargeability appeal.

Ohio's current petition is from the Sixth Circuit's decision in the dischargeability appeal. In affirming the district and bankruptcy courts' determinations of dischargeability, the Sixth Circuit expressly relied upon and readopted its "injunctions which require the performance of acts which necessitate the expenditure of money are really money judgments" rationale of *Kovacs I* which this Court had previously vacated. Thus, the issue common to both this case and *Kovacs I*, the extent to which bank-

ruptcy courts may interfere with state court injunctions mandating the abatement of conditions which threaten public health and environmental quality, is now firmly before this Court for resolution.

The Sixth Circuit's consideration of the mootness issue remanded to it in *Kovacs I* remains pending before it. Presumably the Circuit is waiting for this Court's action on the instant petition for certiorari in order to determine whether its dischargeability decision makes the stay appeal moot.

The Proceedings Below

After Kovacs had filed in the bankruptcy court his motion for imposition of the automatic statutory stay, Ohio filed in the same bankruptcy court on October 20, 1980, an adversary complaint seeking a declaratory judgment that the obligation to comply with the injunctions imposed upon Debtor Kovacs by the Butler County Court of Common Pleas to clean up the Chem-Dyne chemical waste storage site is not dischargeable in bankruptcy. (The adversary complaint is included as Appendix E, A-29-37*). After the filing of a Stipulation and attached exhibits on July 29, 1981 (The Stipulation is included as Appendix F), the State filed a motion for summary judgment. Although the State requested oral argument on the motion, the bankruptcy court decided the motion without the benefit of oral argument. On February 23, 1982, the court denied the State's motion for summary judgment on the grounds that the injunctions were subject to discharge in bankruptcy. (The bankruptcy court's decision is included as Appendix C, A-

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*References to the contents of the Appendices in Support Petition For Writ of Certiorari are indicated by the letter of the Appendix and "A" followed by the page number. References to the contents of the Joint Appendix are indicated by the letter of the Appendix and "JA" followed by the page number.

17-28). Because the decision on the motion for summary judgment was dispositive of the case, final judgment was entered for Debtor Kovacs. The State, unable to obtain the consent of the Debtor to a direct appeal to the Sixth Circuit, filed a timely appeal to the district court. The district court, in its decision of September 17, 1982, affirmed the bankruptcy court's decision. (The district court's decision is included as Appendix B, A-11-17.) The district court based its affirmance of the bankruptcy court on the Sixth Circuit's decision in *Kovacs I* which it treated as "law of the case".

At the time of the State's appeal on the discharge issue to the Sixth Circuit, this Court had vacated the Circuit's prior decision in *Kovacs I*, and thus the "law of the case" doctrine no longer applied. In deciding the instant case, however, the Sixth Circuit expressly readopted the rationale of *Kovacs I* and once more ruled in favor of Kovacs against the State.

Facts Necessary for Review

On September 29, 1976, the State of Ohio, on the relation of its Attorney General, Director of Environmental Protection, and Department of Natural Resources, filed suit in the Butler County, Ohio, Court of Common Pleas, Case No. CV76-09-0834, against, among others, the Chem-Dyne Corporation and William Lee Kovacs, individually and as an officer of Chem-Dyne, alleging, *inter alia*, that defendants had caused the unlawful discharge of toxic water pollutants, i.e., the pesticides endrin, dieldrin and heptachlor, into the waters of the state in violation of Chapter 6111 of the Ohio Revised Code; that the defendants had caused a nuisance in violation of Chapter 3767 of the Ohio Revised Code; and that the defendants' illegal water pollution had caused the death of numerous wild animals, including fish (Appendix F, A-39). The Chem-Dyne Corporation was an

industrial and chemical waste treatment, recycle, storage and disposal company located at 500 Ford Boulevard in the middle of the City of Hamilton, Butler County, Ohio. William Lee Kovacs was one of the two principal corporate officers of the company and was named as a defendant both as an officer of the corporation and individually because the State contended that many of the unlawful acts were committed at his direction and in his presence (Appendix F, A-39).

On July 18, 1979, after more than two (2) years of negotiation, a Stipulation and Judgment Entry was entered in the case. (The Stipulation and Judgment Entry is included as Appendix G, A-43-51). Kovacs personally signed the Stipulation and Judgment Entry. In that Stipulation and Judgment Entry the State of Ohio alleged that the defendants had caused water pollution, nuisance conditions and fish kills in violation of Chapters 6111, 3767 and 1531 of the Ohio Revised Code. Finding No. 1 of the Stipulation established that the defendants were in the business of hauling, recycling and redistributing hazardous industrial waste. The Stipulation and Judgment Entry contained a Finding No. 7 that the defendants had chemical wastes and other types of wastes stored on their premises at 500 Ford Boulevard, Hamilton, Ohio, in the amount of 850,000 gallons in liquid form and 4,000 barrels of solid or semi-solid sludges. In Orders 1 and 2 of the Judgment Entry defendants were enjoined to abate water pollution and nuisance conditions at 500 Ford Boulevard. In Order No. 3 the defendants were ordered to remove all the industrial and other chemical wastes described in Finding No. 7 from the premises at Ford Boulevard within 12 months. In Order No. 8, the defendants were directed to pay $75,000 to the Ohio Department of Natural Resources as compensation for the alleged fish kills.*

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*That part of the order imposing $75,000 money judgment to Ohio DNR is not at issue in this case. The State recognizes this as a money

Because Kovacs failed to implement the injunctions contained in the Stipulation and Judgment Entry requiring the cleanup of the Chem-Dyne site, the State, on January 28, 1980 filed a motion in the Common Pleas Court seeking the imposition of a receivership over Kovacs and Chem-Dyne. (Appendix F, A-40-41). On February 1, 1980, in a written opinion Judge Robert L. Marrs, Butler County Court of Common Pleas, granted the State's motion to have a receivership imposed over the defendants. (The Common Pleas Court's decision is included at Appendix H, A-52). In granting the State's motion the court specifically found that the defendants had failed to remove the industrial and hazardous wastes stored in Hamilton as required by Order No. 3 of the Stipulation and Judgment Entry. The court specifically noted that the defendants had operated in "flagrant disregard of the Stipulation and Judgment Decree." (Appendix H at A-54). On February 4, 1980, the court entered an order appointing Jack Zeltler as receiver and directing the defendants, including Kovacs, to turn over their assets to the receiver for use by the receiver in completing the cleanup obligations imposed upon the defendants in the July 18, 1979 Stipulation and Judgment Entry. (The Order appointing Receiver is included as Appendix J, JA-4-16). The order also contained an injunction imposing upon Kovacs a continuing duty to cooperate with the receiver to complete the removal of wastes.

On July 17, 1980, Kovacs filed a petition for reorganization pursuant to Chapter XI of the Bankruptcy Code, 11 U.S.C. Section 101, *et seq.*, and sought an automatic stay pursuant to 11 U.S.C. Section 362 against the state court receiver, Mr. Zeltler, which was denied. Subsequently, Kovacs converted to straight bankruptcy pursuant to Chapter VII.

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judgment which is dischargeable in bankruptcy. ONR has therefore filed its proof of claim and is using the remedies provided in the Bankruptcy Code to satisfy its money judgment. This appeal deals strictly with the dischargeability of the injunctions contained in Orders 1, 2 and 3 of the July 18, 1979, Stipulation and Judgment Entry.

On September 12, 1980, the State moved the Butler County Court of Common Pleas to hold a hearing to determine whether Debtor Kovacs had additional assets which, pursuant to the court's order of February 4, 1980, should be administered by the receiver and used to complete the cleanup. Specifically, the State alleged that while the cleanup under the receiver's direction was on-going, there was a need for additional assets to complete the removal and lawful disposal of the hazardous waste materials which remained on-site. Since Kovacs had obtained employment elsewhere after the appointment of the receiver, the State asked for the hearing before the Common Pleas Court to determine if Kovacs, pursuant to the injunction establishing his continuing duty to cooperate with the receiver, should be required to provide additional assistance to the receiver in order to complete the removal of waste from the site.

On September 19, 1980, Debtor Kovacs filed in the bankruptcy court a Motion for a Specific Stay seeking a determination that the statutory stay contained in 11 U.S.C. Section 362 applied against the hearing in the Butler County Court of Common Pleas requested by Ohio on September 12. The bankruptcy court held that the automatic stay of the Bankruptcy Code, 11 U.S.C. Section 362, applied to prevent the State from compelling Kovacs to make further efforts to facilitate the cleanup. As a result, the State filed the adversary complaint which is the subject of this case in order to determine whether Kovacs' obligation to comply with the injunctions is dischargeable in bankruptcy.

SUMMARY OF ARGUMENT

I.

This court has held that while bankruptcy courts have equitable authority, they must exercise that authority within

the limits established by Congress. *Security and Exchange Commission v. United States Realty and Improvement Company*, 310 U.S. 434, 455 (1940). Thus, the Bankruptcy Code must be interpreted to implement the intent of Congress. *Sinclair Refining Company v. Atkinson*, 370 U.S. 195, 214-215 (1962). In liquidation proceedings, Congress limited the scope of discharge provided in 11 U.S.C. Section 727(b) to liability on all obligations that fit within the definitions of "claim" and "debt" as defined in 11 U.S.C. Section 101 (4) and (11).

The legislative history of the Bankruptcy Code clearly demonstrates that Congress did not intend to authorize the discharge of all equitable obligations in bankruptcy. Indeed, the remarks of both Representative Edwards and Senator DeConcini, the primary sponsors of the Code, clearly demonstrate that only those equitable obligations which arise from a breach of performance and which may be satisfied by payment as an alternative to performance are included within the defintion of "claim" provided in 11 U.S.C. Section 101(4)(B). Kovacs' obligation to comply with the Butler County Court of Common Pleas' injunction to abate the environmental hazard at the Chem-Dyne site in Hamilton, Ohio, does not fit within the statutory defintion of claim because it meets neither of the elements contained in the statutory definition.

First, Kovacs' obligation to comply with the state injunction arises from his violation of Ohio's environmental laws, not from a mere breach of performance of a contractual duty. Numerous federal court decisions recognize that bankruptcy courts are not to be used as a haven from the consequences which flow from unlawful conduct. See for example, *United States v. Carson*, 669 F. 2d 216 (5th Cir. 1982), and *Barnette v. Evans*, 673 F. 2d 1250 (11th Cir. 1982). The environmental contamination caused by Kovacs in his operation of the Chem-Dyne site was created in violation of Ohio's environmental

statutes which are designed to protect the quality of the environment in Ohio. The mere fact that the results of Kovacs' violations presented such a major threat to public health and safety as to require a civil enforcement action for injunctive relief to prevent further harm rather than a criminal prosecution does not change the fact that Kovacs' conduct violated Ohio's environmental statutes. See, *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975), and *Trainor v. Hernandez*, 431 U.S. 434 (1977). In addition, Kovacs' "flagrant disregard" of the state court injunction to abate the environmental hazard constitutes an act of criminal contempt of court. Ohio Revised Code Section 2705.02(A) and 2705.05.

Second, Kovacs has no right of payment as an alternative to performance of the abatement of environmental contamination ordered by the state court. When there has been a failure to implement acts mandated by an injunction, the courts have recognized that a receivership may be employed to develop the cooperative approach necessary to implement the acts required by the injunction. *Morgan v. McDonough*, 540 F. 2d 527 (1st Cir. 1976), *cert. den.*, 429 U.S. 1042 (1977); *U.S. v. City of Detroit*, 476 F. Supp. 512 (E.D. Mich. 1979). The receivership imposed by the state court to implement the abatement of the health hazard mandated by its prior injunction was not a substitute for performance of the injunction, but rather, was for the purpose of implementing the injunction. Therefore, any expenditure made by Kovacs to assist the receivership was made, not as an alternative to performance of the injunctions, but rather to implement the injunctions. Thus, since Kovacs' obligation to clean up the Chem-Dyne site could not be satisfied by a right to payment as an alternative to performance of the abatement of the health hazard, that obligation does not fit within the Bankruptcy Code's defintion of "claim".

II.

The decision of the Sixth Circuit below disregards the repeated holdings of this Court that statutes should not be interpreted to create results which Congress specifically rejected. *Gulf Oil Corporation v. Copp. Co.*, 419 U.S. 186, 200 (1974); *Sinclair Refining Co. v. Atkinson*, *supra*, at 214-215. The Sixth Circuit's holding, that any injunction which necessitates the expenditure of money to accomplish the act mandated by the injunction can be discharged in bankruptcy, disregards the express limitation imposed by Congress in the definition of "claim" on the type of equitable obligations which may be discharged in bankruptcy. Indeed, the Sixth Circuits' decision does not even attempt to analyze the question in light of the definition of "claim" which Congress finally enacted. In contrast to the approach of the Sixth Circuit, the Third Circuit, in *Penn Terra Limited v. Department of Environmental Resources*, unreported, Case No. 83-5448 (April 30, 1984), held that the Bankruptcy Code should not be interpreted to treat as money judgments injunctions to perform acts which necessitate the expenditure of funds. The Third Circuit noted that the adoption of such an interpretation would effectively preclude meaningful injunctive relief in environmental cases. Therefore, since the effect of the Sixth Circuit's disregard of the Congressional definition of "claim" would be to destroy the usefulness of injunctive relief in environmental enforcement proceedings, the decision below should be reversed.

ARGUMENT

I. IN DEFINING THE SCOPE OF DISCHARGE UNDER THE BANKRUPTCY CODE, CONGRESS MADE A POLICY CHOICE TO PLACE OUTSIDE OF THE SCOPE OF DISCHARGE THE OBLIGATION TO COMPLY WITH INJUNCTIONS REQUIRING THE ABATEMENT OF A HAZARD TO PUBLIC HEALTH AND SAFETY WHICH HAZARD WAS CREATED IN VIOLATION OF STATE ENVIRONMENTAL LAWS.

A. Congress Has Determined That Only Obligations Which Are "Claims" Or "Debts" As Defined In 11 U.S.C. Section 101(4) And (11) Are Subject To Discharge In Bankruptcy.

This Court has held that while bankruptcy courts have equitable authority, they must exercise that authority within the limits established by Congress. *Securities and Exchange v. Commission v. United States Realty and Improvement Co.*, 310 U.S. 434, 455 (1940). Furthermore, when implementing a provision of the Bankruptcy Code, it must be done in the manner directed by Congress. *In re Bell*, 700 F. 2d 1053, 1057 (6th Cir. 1983); *In re Cando Diamond Corp.*, 26 W.B.R. 850, 851 (Bkrtcy. S.D.N.Y. 1983); *In re Robert Eugene Oakes*, 24 W.B.R. 766, 770 (Bkrtcy, N.D. Ohio, 1982). Therefore, as this Court has repeatedly held in any question of statutory construction, the Bankruptcy Code must be interpreted to implement the intent of Congress. *Philbrook v. Gladgett*, 421 U.S. 707, 713 (1975); *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195, 214-215 (1962); *People of Puerto Rico v. Shill Co.*, 302 U.S. 253, 262 (1937). The particular question presented by this case is whether the obligation to comply with an injunction to abate a threat to public health and safety which was issued by a state court in an action brought by state officials to enforce state environmental laws may be discharged in bankruptcy. The answer to this question must reflect the policy choice made by Congress as to whether the obligation is within the scope of discharge which Congress established. *In re Cox*, 33 W.B.R. 657, 661, fn. 4 (Bkrtcy. M.D. Ga. 1983).

In liquidation proceedings, final relief in the form of discharge is authorized and governed by 11 U.S.C. Section 727(b), which provides in pertinent part:

> (b) Except as provided in Section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter, and any liability on a claim is determined under section 502 of this title as if such claim had arisen before the commencement of the case whether or not a proof of claim based on any such debt or liability is filed under section 501 of this title, and whether or not a claim based on any such debt or liability is allowed under section 502 of this title. (Emphasis supplied.)

Section 727(b) plainly indicates that only "debts" and "claims" as defined in the Bankruptcy Code are dischargeable.[1] The term "debt" is defined for bankruptcy purposes as "liability on a claim". 11 U.S.C. Section 101(11). "Claim" in turn is defined at 11 U.S.C. Section 101(4) as follows:

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1. In this regard, the Bankruptcy Reform Act of 1978 is conceptually similar to its predecessor, the Bankruptcy Act of 1898. Under Section 1 (15) of the old Bankruptcy Act (former 11 U.S.C. Section 1 (15)), a discharge in bankruptcy by definition operated only to release a bankrupt "from all of his debts which . . . [were] provable in bankruptcy" (emphasis supplied), and the term "debt" itself was defined in terms of provability. See Section 1 (14) of the Bankruptcy Act, former 11 U.S.C. section 1 (14). In construing the provisions of the Bankruptcy Act, courts recognized that "[o]nly provable debts are discharged by the operation of Section 17; all other obligations of the bankrupt remain in full force." *Zavick v. Freeman*, 373 F.2d 110, 116 (3d Cir. 1967), cert. den. 389 U.S. 835. And see *Crawford v. Burke*, 195 U.S. 176, 186, (1904); and 1 *Collier on Bankruptcy* section 17.03, at 1580 (14th ed. 1968). Thus, the Congressional decision in the Bankruptcy Reform Act to limit the scope of discharge to claims which qualify as "debts" was by no means a novel one.

> "claim" means—
>
> (A) *right to payment*, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
>
> (B) *right to an equitable remedy for breach of performance if such breach gives rise to a right to payment*, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured or unsecured. . . . (Emphasis supplied.)

The definition of "claim" in 11 U.S.C. Section 101 (4) clearly indicates that certain causes of action for equitable relief fall outside the scope of the term "claim" and therefore cannot serve as the basis of a "debt" which may be discharged in bankruptcy. Under the governing definitions of 11 U.S.C. Section 101(4) and (11), a right to an equitable remedy may constitute a "claim" and a "debt" susceptible to discharge in bankruptcy *only if*: (i) the equitable remedy arises from a breach of performance and; (ii) such breach of performance also gives rise to an alternative right to payment. In order to determine the significance of this statutory language, this Court has repeatedly recognized that it is appropriate to examine the legislative history of the statute. *National Labor Relations Board v. Bell Aerospace Co.*, 410 U.S. 267, 274-275 (1974); *United States v. Wise*, 370 U.S. 405, 414 (1962).

Upon examining the legislative history of the Bankruptcy Code, it is clear that the exclusion from the definition of "claim" of any right to an equitable remedy which arises from circumstances other than a breach of perfor-

mance and which is not supplemented by an alternative right to payment was *not* a mere legal technicality or a product of legislative inadvertence. On the contrary, the legislative history demonstrates that 11 U.S.C. Section 101(4) was drafted with full awareness of the impact of the definition of the word "claim" on the scope of discharge and of the "fresh start" accorded to debtors thereby. Therefore, the Congressional decision to make the dischargeability of rights to equitable remedies turn upon the nature of the conduct which gives rise to the remedy and the availability of alternative rights to payment represents a deliberate policy choice concerning the scope of discharge under Title 11.

B. An Equitable Remedy Fits Within The Bankruptcy Act's Definition of "Claim" Only If A Breach Of Performance Gives Rise To An Alternative Right To Payment.

The Bankruptcy Reform Act of 1978 began as H.R. 8200 which was introduced by Representative Edwards on July 11, 1977. The term "claim" was defined in the original bill to include a "right to an equitable remedy for breach of performance if such breach does not give rise to a right to payment. . . ." (Emphasis supplied.)[2] H.R. 8200 was referred to the House Judiciary Committee, which reported out the bill with amendments on September 8, 1977.[3] In its report on H.R. 8200, the House Judiciary Committee made the following observations on the scope of the term "claim":

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[1]A. Resnick and E. Wypski, *Bankruptcy Reform Act of 1978: A Legislative History* (hereinafter cited as "Leg. Hist."), vol. 12, document 41, at p. 3 (William S. Hein & Co., Inc., Buffalo, 1979). This work is a multi-volume compilation of all the important documentation concerning Congressional action on the Bankruptcy Reform Act. All references herein to legislative history shall cite this source by the author's volume and document numbers. (The work preserves the pagination of the original documents.)

Paragraph (4) defines 'claim'. The effect of the definition is a significant departure from present law. Under present law, 'claim' is not defined in straight bankruptcy. Instead it is simply used, along with the concept of provability in section 63 of the Bankruptcy Act, to limit the kinds of obligations that are payable in a bankruptcy case. The term is defined in the debtor rehabilitation chapters of present law far more broadly. The definition in paragraph (4) adopts an even broader definition of claim than is found in the rehabilitation chapters. The definition is any right to payment, whether or not reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured. *The definition also includes as a claim an equitable right to performance that does not give rise to a right to payment. By this broadest possible definition and by use of the term throughout the title 11, especially in subchapter 1 of chapter 5, the bill contemplates that all legal obligations of the debtor, no matter how remote or contingent, will be able to be*

Document 41 is the House Judiciary Committee's initial print of H.R. 8200. The Committee print set forth the language of the bill as originally introduced at pp. 1-307.

[3]The Judiciary Committee amended the original definition of "claim" in two respects, neither of which is material here. The Committee amendment did not alter the above-quoted portion of the definition. See 12 *Leg. Hist.* doc. 41, at pp. 309-310 or 14 *Leg. Hist.*, doc 44 (Cong. Rec., October 28, 1977), pg. H 11734 for the Judiciary Committee definition.

> *dealt with in the bankruptcy case. It permits the broadest possible relief in the bankruptcy court.*

13 *Leg. Hist.*, doc. 42 (H.R. Rept. No. 95-595, 95th Cong., 2d Sess. 1978), p. 309. (Emphasis supplied.) Thus, in contrast with the final provisions of the Bankruptcy Reform Act, early House versions of bankruptcy reform legislation treated any right to an equitable remedy as a "claim" even though such equitable remedy did not serve as an alternative to monetary relief.

On October 31, 1977, while H.R. 8200 was before the Committee of the Whole House on the State of the Union, Senator DeConcini introduced S. 2266, the Senate's bankruptcy reform measure. The definition of "claim" in S. 2266 as originally introduced was identical to that adopted by the House Judiciary Committee in the version of H.R. 8200 then before the Committee of the Whole House.[4]

Subsequently both houses recoiled from the extreme breadth of the definition of "claim" included in the early versions of the Bankruptcy Reform Act. On July 14, 1978, the Senate Judiciary Committee reported S. 2266 with amendments, including an amendment deleting from the definition of "claim" all references to rights to equitable remedies. 17 *Leg. Hist.*, doc. 53, p. 299 (definition in brackets); cf. 14 *Leg. Hist.*, doc 46

[4]A side by side comparative presentation of S. 2266, as originally introduced, and H.R. 8200, as amended by the House Judiciary Committee, is set forth in a Senate Judiciary Committee print included as part of the record of Hearings before the Sub-committee on Improvements in Judicial Machinery of the Committee on the Judiciary, 95th Cong., 1st Sess., November 28, 29, December 1, 1977. 14 *Leg. Hist.*, doc. 47A. A single definition of "claim" appears at p. 6 of the Hearing, p. 4 of the Committee print. The original language of S. 2266 is also set forth in 17 *Leg. Hist.*, doc. 53, pp. 1-296, with the original Senate definition of "claim" at p. 4.

(Judiciary Committee print) pp. 3-4. The Senate Finance Committee further amended the definition of "claim" but did not restore language referring to a right to an equitable remedy for breach of performance. 17 *Leg. Hist.*, doc. 53, p. 299 (definition in bold face italics). On September 7, 1978, the full Senate took up consideration of H.R. 8200, substituted the text of S. 2266 (which no longer treated any rights to equitable remedies as claims), and then passed H.R. 8200 as amended. 17 *Leg. Hist.*, doc. 55 (excerpts from the Congressional Record of September 8, 1978), p. S 14745. Thus, the version of the Bankruptcy Reform Act as originally passed by the Senate deleted all references to equitable remedies from the definition of "claim" and restricted that definition exclusively to rights to payment.

On September 28, 1978, the House took up reconsideration of H.R. 8200 as amended by the Senate. Representative Edwards proposed compromise language to be inserted in lieu of the Senate amendment. 17 *Leg. Hist.*, doc. 58 (excerpts from the Congressional Record), p. H. 11047. The definition of "claim" in the substitute language proposed by Edwards is identical to the definition which appears in 11 U.S.C. section 101(4) as finally enacted. In his remarks explaining the substitute proposal Representative Edwards stated:

> Section 101(4)(B) represents a modification of the House-passed bill to include [in] the definition of 'claim' a right to an equitable remedy for breach of performance if such breach gives rise to a right to payment. This is intended to cause the liquidation, or estimation of *contingent rights of payment for which there may be an alternate equitable remedy* with the result that the equitable remedy will be susceptible to being discharged in bankruptcy. For example,

> *In some states, a judgment for specific performance may be satisfied by an alternative right to payment, in the event that performance is refused; in that event the creditor entitled to performance would have a 'claim' for purposes of a proceeding under title 11.*
>
> *On the other hand, rights to an equitable remedy for breach of performance with respect to which such breach does not give rise to a right to payment are not 'claims' and would therefore not be susceptible to discharge in bankruptcy.*

17 *Leg. Hist.*, doc. 58 (excerpts from Congressional Record), p. H 11090. (Emphasis supplied). Ultimately the Senate concurred in the new definition of "claim" adopted by the House, and the definition in 11 U.S.C. section 101(4) was enacted into law.

The above-quoted remarks of Representative Edwards, and the nearly identical comments of Senator DeConcini,[9] evidence a recognition that the definition of "claim" affects the scope of discharge and that only those equitable remedies which arise from a breach of performance and constitute alternatives to monetary relief are "claims" which would be susceptible to discharge. The example chosen by Representative Edwards and Senator DeConcini to illustrate the application of 11 U.S.C. Section 101(4)(B) was a situation in which a monetary award could be substituted in full and complete satisfaction of an equitable judgment for a breach of contract.

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[9] 17 *Leg. Hist.*, doc. 59 (excerpts from Congressional Record for October 6, 1978), e.p. S 17408.

Thus, where equitable remedies and monetary relief stand side by side as alternate remedies for the same breach of performance, the statute in effect forces an "election" of the monetary remedy which clearly qualifies as a "claim" susceptible to discharge under 11 U.S.C. Section 101(4)(A). Significantly, the illustration chosen by Edwards and DeConcini, in keeping with the legislation's contract-oriented references to breaches of performance (rather than to breaches of duty), related to specific performance, an equitable remedy for breach of contract, rather than to equitable remedies to enjoin continuing or prospective torts or crimes.

Thus, Congressional consideration of the extent to which equitable obligations were to be susceptible to discharge in bankruptcy underwent three phases: first, all equitable obligations were to be subject to discharge; then as a result of a Senate amendment, no equitable obligations were to be dischargeable; and finally, only those equitable obligations which arise from a breach of performance and which can be satisfied by an alternative right to payment in lieu of performance were made susceptible to discharge.

C. The Equitable Obligations Imposed Upon Debtor Kovacs By The July 18, 1979 Stipulation And Judgment Entry And The February 4, 1980 Order Appointing Receiver Are Not "Claims" Or "Debts" Within The Meaning of 11 U.S.C. Section 101(4) or (11) Because They Arise From Violations Of Law, Not A Breach Of Performance.

1. Kovacs' obligation to abate the environmental hazard at the Chem-Dyne site arises from his violations of Ohio's environmental laws.

The aspect of this case which makes the case of such critical importance to federal, state and local environmental protection officials is the nature of the conduct which gave rise to Kovacs' obligation to comply with the injunctions issued by the Butler County Common Pleas Court. The state court case was initiated by a complaint filed by Ohio against Kovacs and others alleging that Kovacs and his associates conducted their hazardous and industrial waste disposal business in violation of Ohio's water pollution and nuisance laws, Chapters 6111 and 3767 of the Ohio Revised Code. (Appendix F, A-39). The Butler County Court of Common Pleas found that Kovacs and his associates had violated Ohio's environmental laws as alleged by the State and issued a preliminary injunction. (Appendix F, A-39-40). Ultimately, on July 18, 1979, the state court, with Kovacs' consent, issued a comprehensive injunction requiring Kovacs to abate the environmental hazard which he had created by operating his business in violation of Ohio's environmental laws. Thus, the obligation imposed upon Kovacs by the state court injunctions did not result from a mere breach of performance of a commercial obligation. Rather, the obligation arose from Kovacs' violation of Ohio's environmental laws enacted pursuant to the State's police power to protect the health and environment of its citizens.

The distinction between a breach of performance imposed by a commercial obligation and a breach of a duty imposed by a state statute was emphasized in a comprehensive discussion which appeared in the *American Bankruptcy Law Journal*[*] concerning the types of obligations which constitute claims under the Bankruptcy Code. The author observed that the term "breach of perfor-

[*]Mathews, "The Scope of Claims Under The Bankruptcy Code", 57 *American Bankruptcy Law Journal*, Summer 1983, pp. 221-246 (First Installment) and 57 *American Bankruptcy Law Journal*, Fall 1983, pp. 339-383 (Second Installment).

mance" should not be interpreted to include a violation of statutory duties which are continuing in nature. He explained that:

> There is an important distinction between these statutory duties and contractual duties generally. In the situation where a party materially breaches a private contract, the innocent party is entitled to treat the contract as at an end and sue for the damages caused. In contrast, statutory duties are not necessarily susceptible of liquidation and *often impose continuing obligations on a party*. For example, a right to money damages for employment discrimination under the Civil Rights Act of 1964 is a subsection (A) claim and subject to liquidation and discharge. A right to injunctive relief under the Act, however, even if considered a subsection (B) claim, *would not be discharged to the extent that the wrong continued after the date of the bankruptcy petition.*[***] In this respect, interpreting the phrase "breach of performance" broadly in order to include, generally, all statutory rights is unnecessary. *Where statutes impose continuing obligations on a party, those obligations do not cease when the party seeks bankruptcy relief* and it is thus unnecessary to classify the equitable rights to the fulfillment of those obligations as claims under subsection (B).

The case of a continuing statutory obligation (such as to refrain from polluting a stream) should be contrasted with

[***]Footnotes omitted.

the case of a continuing contractual obligation (such as to refrain from competing against a former employer). *Insofar as the "fresh start" purpose of the Bankruptcy Act is concerned, one might argue that a bankrupt chemical company would be better off if, in the future, it did not have to adhere to anti-pollution laws. The strong public interest in applying the law generally, however, is sufficient to justify applying the law to a rehabilitated chemical company.* There is no similar interest in requiring the employee to refrain from competing against his former employer after the employee has gone through bankruptcy Thus, the right of an employer to enjoin the employee from competing is properly a dischargeable claim under subsection (B). *In contrast, there is neither a "fresh start" purpose nor a distributional rationale* (as noted in the preceding paragraph) *for classifying a party's right to enjoin the chemical company from polluting as a claim under subsection (B).*

Id. at 350-351 (Emphasis supplied).

Thus, since the obligation imposed upon Kovacs by the injunctions is effectively an obligation to abate conditions which violate state environmental law, and since that obligation is continuing in nature, Kovacs' obligation to abate the continuing nuisance at the Chem-Dyne site arises from a violation of law, not a mere breach of performance. Therefore, that duty to comply with the state court injunctions does not fall within the definition of "claim" as defined in 11 U.S.C. Section 101(4)(B).

Indeed, the federal courts have repeatedly recognized that obligations imposed upon debtors which result from the debtors' conduct in violation of law are of a fundamentally different nature than the financial obligations imposed upon debtors by their business transactions in the commercial world. In *United States v. Carson*, 669 F. 2d 216 (5th Cir. 1982), the Fifth Circuit held that the obligation to make restitution to a crime victim which was imposed as a condition of probation in a criminal sentence was not dischargeable in bankruptcy. *Accord: In re Cox, supra; In re Johnson*, 32 W.B.R. 614 (Bkrtcy. Ariz. 1982); *In re Davis*, 18 W.B.R. 701 (D. Del. 1983); *In re Newton*, 15 W.B.R. 706 (Bkrtcy. N.D. Ga. 1981); *In re Button*, 8 W.B.R. 692 (Bkrtcy. W.D. N.Y. 1981). See also, *Barnette v. Evans*, 673 F. 2d 1250 (11th Cir. 1982); *In re Lare*, 24 W.B.R. 959 (D. Md. 1982). In each of the above-cited cases the courts have reasoned that the duty to abate the consequences of illegal conduct does not create a debtor-creditor relationship between the law-breaker and the state. Rather, the obligation to abate the harm caused by illegal conduct was viewed as both punishment of the offender and rehabilitative in that it forces the violator to assume the consequences of the illegal conduct.

In the state court, Ohio charged Kovacs with violations of Ohio Revised Code Chapter 3767, involving the creation of a public nuisance and Chapter 6111, involving illegal water pollution. The illegal environmental contamination which Kovacs caused by the manner in which he conducted the business of the Chem-Dyne Corporation is a misdemeanor under Ohio law for which Kovacs could have been imprisoned for up to one year. See Section 6111.99 of the Ohio Revised Code. Chapter 6111 of the Ohio Revised Code, however, also provides a mechanism for civil enforcement of its requirements by means of actions for injunctive relief. See Revised Code Section 6111.07. In this case, the danger posed to public health and safety by Kovacs' indiscriminate disposal of toxic chemical wastes such as endrin, dieldrin and

heptachlor, mandated just such an action for injunctive relief to prevent any additional harm to the citizens and natural resources in the surrounding area. In fact, the Butler County Common Pleas Court granted the preliminary injunction to prevent any further unlawful pollution. (Appendix F, A-39-40). There remained, however, the ever-increasing amount of hazardous waste stored on the Chem-Dyne site in a manner which threatened public safety. The threat of fires and explosions, the noxious fumes which emanated from the site, and the potential for another toxic chemical spill posed a continuing threat to the public. Thus, the State was required to press forward for more comprehensive injunctive relief to prevent additional future harm to the public and Ohio sought broader injunctive relief requiring the removal of all the waste materials from the site. This remedy was ultimately obtained in the Stipulation and Judgment Entry of July 18, 1979. The fact that the danger posed to the public by Kovacs' violations of Ohio's environmental statutes necessitated the use of a civil action for injunctive relief to abate further harm to Ohio's citizens and their environment does not, however, change the fact that Kovacs' obligation to abate the threat to public safety arose from his violations of Ohio's laws enacted pursuant to its police power rather than from some breach of performance in the commercial world such as the contractual duty to which Representative Edwards and Senator DeConcini referred in the legislative history of the Code.

Indeed, in *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975), this Court expressly recognized that an attempt pursuant to Ohio's public nuisance statute, Revised Code Chapter 3767, one of the very same statutes involved in the case at bar, to obtain injunctive relief against conduct which violated Ohio's statutes merited the same consideration

from the Court as if a criminal prosecution had actually been initiated.[*] This Court declared that:

> [W]e deal here with a state proceeding which in important respects is more akin to a criminal prosecution than are most civil cases. The State is a party to the Court of Common Pleas proceedings, and the proceeding is both in aid of and closely related to criminal statutes. . . .
> *Thus, an offense to the State's interest in the nuisance litigation is likely to be every bit as great as it would be were this is a criminal proceeding. *** Similarily, while in this case the District Court's injunction has not directly disrupted Ohio's criminal justice system, it has disrupted that State's efforts to protect the very interests which underlie its criminal laws and to obtain compliance with precisely the standards which are embodied in its criminal laws.*

Id. at 604-605. (Emphasis supplied).

Similarly, in *Trainor v. Hernandez*, 431 U.S. 434 (1977), this Court reviewed the issuance by a federal court of an injunction to prevent a civil action to recover welfare payments fraudulently obtained. The Court noted that the state could have proceeded with either a civil or a criminal enforcement action against the illegal, fraudulent conduct. *Id.* at 444. This Court then concluded that it saw no difference between a criminal prosecution and "an ongoing

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[*]Several decisions have recognized that *Younger v. Harris*, 401 U.S. 37 (1971), and its progeny, including *Huffman*, *supra*, are fully applicable to bankruptcy courts which are asked to interfere with state criminal proceedings or civil enforcement proceedings. *Barnette*, *supra*, at 1251-1252; *Lare*, *supra*, at 961; *Davis*, *supra*, at 703.

civil enforcement action such as this, brought by the State in its sovereign capacity." *Id.* Thus, it is clear that the necessity for Ohio to initiate a civil action for injunctive relief to prevent additional harm to the public, rather than a criminal remedy, to deal with Kovacs' statutory violations does not somehow transform blatantly unlawful, illegal conduct into a mere "breach of performance". *See also, Duke v. Texas*, 477 F. 2d 244, 250-252 (5th Cir. 1973); *Palaio v. McAuliffe*, 466 F. 2d 1230, 1233 (5th Cir. 1972).

The strong analogy between the duty imposed upon Kovacs by the July 18, 1979, Stipulation and Judgment Entry and criminal restitution is clearly evident: both duties arise as a result of illegal conduct and a violation of a statutory duty, not a breach of performance of a contractual obligation. The comparison is further strengthened by the fact that Kovacs accepted the obligation to abate the public health hazard at the Chem-Dyne site as a means of avoiding the imprisonment which could follow if Ohio did initiate a criminal prosecution. Paragraph 8 of the Stipulation and Judgment Entry (Appendix G, A-45) expressly states that Kovacs' obligation to abate the environmental hazard at the Chem-Dyne site would be in full satisfaction of all his potential liabilities at the Chem-Dyne site. Thus, the common element of both civil and criminal enforcement actions for violations of regulatory schemes is that the conduct at which they are addressed arises not from a mere breach of performance of a contractual obligation but from a violation of a duty imposed by statute.

In addition to the violations of statutory requirements which give rise to Kovacs' obligation to the people of Ohio, his "flagrant disregard", in the words of the Common Pleas Court (A-54), of the duty imposed upon him by the court order of July 18, 1979, to abate the environmental hazard at the Chem-Dyne site constitutes a contempt of court. Once more, a specific Ohio statute, Revised Code Sections 2705.02(A) and 2705.05, declare such conduct to be a criminal act for which the perpetrator may be

imprisoned. Yet the decision of the Sixth Circuit below effectively shields Kovacs from his liability for criminal contempt.

This Court, however, has indicated that it views any interference with the contempt power of state courts to be a grave matter. In *Juidice v. Vail*, 430 U.S. 327 (1977), this Court declared:

> A State's interest in the contempt process through which it vindicates the regular operation of its judicial system, so long as that system itself affords the opportunity to pursue federal claims within it, is surely an important interest . . . . The contempt power lies at the core of the administration of a State's judicial system. *** Whether . . . labeled civil, quasi-criminal, or criminal in nature, we think the salient fact is that federal court interference with the State's contempt process is "an offense to the State's interest. . . likely to be every bit as great as it would be were this a criminal proceeding."***

Id. at 335-336.

Therefore, it is clear that Kovacs' obligations to comply with the injunctions of the Butler County Court of Common Pleas do not involve any "breach of performance" as explained by Representative Edwards and Senator DeConcini with which the bankruptcy court had any legitimate interest. Rather, Kovacs' obligation to Ohio to prevent further harm to the citizens of Ohio arises from his repeated unlawful acts. The observation of the Eleventh Circuit in *Barnette v. Evans*, *supra*, is fully applicable here:

> The basic error of the bankruptcy judge was to misjudge the width of his turf. The purpose of bankruptcy is to protect those in financial, not moral, difficulty. The bankruptcy courts were not created as a haven for criminals.

Id. at 1251. Thus, since Kovacs' obligation to Ohio does not arise from any "breach of performance", his obligation to comply with the injunctions issued by the Butler County Court of Common Pleas requiring him to abate the on-going threat to public health and safety at the Chem-Dyne site is not a "*debt*" or a "claim" as defined in the bankruptcy Code.

2. Congress did not intend to include violations of law within the phrase "breach of performance."

It is, of course, a settled canon of statutory construction that when interpreting a statute a court should not look at an isolated word or phrase, but rather should construe the statute as a whole. *Kukoszka v. Belford*, 417 U.S. 642, 650 (1974). When this approach is applied to the phrase "breach of performance" as used in 11 U.S.C. Section 101(4)(B), it is clear that Kovacs' obligation, which arises from his violations of Ohio's environmental laws rather than bad judgment in his commercial ventures, is not included within the meaning of the phrase under discussion.

The primary provisions of the Bankruptcy Code which demonstrate the intent of Congress to exclude the consequences of illegal conduct from the scope of bankruptcy are the exceptions provided at 11 U.S.C. Section 362(b) from the scope of the Code's automatic stay. Subsections 362 (b)(1), (4) and (5) indicate that both criminal prosecutions and civil enforcement actions to abate violations of

police power regulatory programs are exempt from the scope of the automatic stay. By each of these exceptions Congress clearly indicated that debtors who violate the law should not look to the bankruptcy courts for protection from the consequences of their illegal conduct.

Indeed, the legislative history of the exceptions from the scope of the stay further substantiate that Congress did not intend to allow the Bankruptcy Code to be used as a safe harbor for lawbreakers. To begin with, both the House Committee Report, 13 *Leg. Hist.*, doc. 42 (House Report No. 95-595, 95th Cong., 1st Sess. (1977)), p. 342, and the Senate Committee Report, 16 *Leg. Hist.*, doc. 52 (Senate Report No. 95-989, 95th Cong., 2nd Sess. (1978)), p. 51 clearly declare that:

> The bankruptcy laws are not a haven for criminal offenders, but are designed to give relief from financial overextension. Thus, criminal actions and proceedings may proceed in spite of bankruptcy.

The Committee Reports reflect a similar view towards the civil equivalent of a criminal proceeding, a civil enforcement action to abate a violation of police power or other regulatory requirements. House Report 95-595 states that:

> Under present law, there has been some overuse of the stay in the area of governmental regulation. For example, in one Texas bankruptcy court, the stay was applied to prevent the State of Maine from closing down one of the debtor's plants that was polluting a Maine river in violation of Maine's environmental protection laws. . . . The bill excepts these kinds of actions from the automatic stay. *The States will be able to enforce their police*

> *and regulatory powers free from the automatic stay.* The bankruptcy court has ample additional power to prevent damage to the bankrupt estate by such actions on a case-by-case basis. *By excepting these State actions from the scope of the automatic stay, the court will be required to examine the State actions more carefully, and with a view to protecting the legitimate interests of the State as well as of the estate,* before it may enjoin actions against the debtor or the estate.

13 *Leg. Hist.*, doc. 42, at 174-175 (Emphasis supplied). The same policy is reflected in Senate Report 95-989. 16 *Leg. Hist.*, doc. 52, p. 58.[9]

The intent of Congress to prevent the Bankruptcy Code from being used to evade the responsibility to comply with State law is also illustrated by the provisions of 28 U.S.C. Section 959(b) which mandate a trustee to conduct the bankruptcy estate in accordance with the requirements of valid state laws. Indeed, in reviewing an injunction which was issued by a bankruptcy court under the prior Bankruptcy Act in order to prevent enforcement of a state court injunction which would have required compliance with a state law, this Court stated that:

> We do not believe that Congress intended to leave to individual judges the question of whether state laws should be accepted or disregarded. . . .

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[9]The Senate Report does caution that police power actions which advance only the pecuniary interest of the government should not be used to provide government with preferential treatment in the estate to the detriment of other creditors. As even the Bankruptcy Court acknowledged below (JA-31) however, this factor is not present in this case. Ohio does not seek to share in the bankruptcy estate. Rather, it claims that Kovacs' obligation is non-dischargeable and that Kovacs should satisfy that obligation by means of his post-petition assets.

Calloway v. Benton, 336 U.S. 132, 141 (1949).

Thus, throughout the Code, Congress has repeatedly expressed its intent that bankruptcy not be used as a mechanism to evade compliance with state statutes. In addition, this Court and the lower federal courts have recognized that sheltering lawbreakers from the consequences of illegal conduct is not within the authority of the bankruptcy courts. Therefore, the State of Ohio respectfully submits that Kovacs' obligation, resulting from his violation of Ohio's environmental laws, to the people of Ohio to comply with the state court order requiring Kovacs to abate the environmental hazard at the Chem-Cyne site does not involve a "breach of performance" as that phrase is used in the Bankruptcy Code's definition of the word "claim".

D. The Equitable Obligations Imposed On Debtor Kovacs By The July 18, 1979 Stipulation And Judgment Entry And The February 4, 1980 Order Appointing Receiver Are Not "Claims" Or "Debts" Within The Meaning Of 11 U.S.C. Section 101(4) Or (11) Because Kovacs' Failure To Perform Those Obligations Does Not Give Rise To An Alternative Right To Payment.

1. The imposition of the receivership by the Common Pleas Court was intended to effectuate the cleanup of the Chem-Cyne site required by the Court's order of July 18, 1979.

As previously indicated, the result of Ohio's enforcement action against Kovacs and his associates was a consent order entered on July 18, 1979, in which the

Common Pleas Court ordered Kovacs and Chem-Dyne to abate all violations of state water pollution and nuisance laws by removing from the Chem-Dyne site within twelve (12) months all hazardous industrial waste stored on site in a manner consistent with the time schedule contained in the order. Six months later, rather than finding the inventory of hazardous waste reduced by half, the State found the amount of hazardous material stored on site by Kovacs to have nearly doubled from the amount on site in July, 1979. As a result, on January 28, 1980, the State filed a motion for the appointment of a receiver to implement the July 18, 1979 Stipulation and Judgment Entry. After a hearing on the motion, the Common Pleas Court found as follows:

> The Court would find that with regard to the alleged violations with regard to the disposal and removal of the waste material, that there has likewise been a gross abuse by the Defendants of not properly recording the initial inventory and the allowance of additional disposal material (objectionable waste) to enter the premises and the continued operation of the business was a flagrant disregard of the Stipulation and Judgment Decree. (Appendix H, A-54).

A receiver was then appointed on February 4, 1980 to take possession of the defendants' assets and abate the continuing threat to public safety by completing the removal of the hazardous chemical wastes as required by the injunction contained in the Stipulation and Judgment Entry. The appointment of the receiver did not, however, free Kovacs of his obligation under the Stipulation and Judgment Entry. Rather, the order contained an injunction against Kovacs expressly requiring him to assist and cooperate with the receiver in the implementation of the Stipulation and Judgment Entry. (Appendix J, JA-15).

Because the need to remove the hazardous chemicals at the Chem-Dyne site and prevent additional damage to the public was so great, Ohio did not initially react in a punitive manner toward Kovacs' flagrant disregard of the state court's injunction. Rather, it sought an additional mechanism to implement the cleanup and protect the health and safety of the citizens of Hamilton, Ohio. When a party against whom an injunction was issued has failed to implement the acts mandated, the propriety of employing a receiver to implement the order has been repeatedly recognized by the federal courts. In *Morgan v. McDonough*, 540 F. 2d 527 (1st Cir. 1976), *cert. den.*, 429 U.S. 1042 (1977), the First Circuit expressly recognized the usefulness of a receivership to implement a school desegregation decree:

> The receivership here was a means to enlist without delay top Boston School Department leadership to work in conjunction with the court on the troubles of the School. . . . The more usual remedies – contempt proceedings and further injunctions – were plainly not very promising, as they invited further confrontation and delay; and when the usual remedies are inadequate, a court of equity is justified, particularly in aid of an outstanding injunction, in turning to less common ones, such as receivership, to get the job done. * * *

Id. at 533. (Emphasis supplied). *See also, Newman v. State of Alabama*, 466 F. Supp. 628 (M.D. Ala. 1979); *Turner v. Goolsby*, 255 F. Supp. 724 (S.D. Ga. 1966). In a similar manner, a receivership has been employed to implement injunctions requiring the abatement of unlawful water pollution. *United States v. City of Detroit*, 476 F. Supp. 512, 526 (E.D. Mich. 1979). Once again, the use of the receiver was justified as a means of eliciting the cooperation necessary to implement a difficult and complex task.

Under Ohio law a receiver is not the mere agent of the party that moved for the receiver's appointment. Rather, the receiver is an officer of the court who must be responsive to the needs and interests of all parties. *Merchants' National Bank v. McLeod*, 38 Ohio St. 174, 182 (1882); *McDorman v. Johnson*, 34 Ohio L. Abs. 647, 651, 39 N.E. 2d 162, 166 (Miami App. 1937). Thus, as in the federal system, a receiver under Ohio law is a useful mechanism for obtaining cooperation from, and coordination of, the efforts of numerous entities to implement a complex task such as the Chem-Dyne cleanup. At the time Ohio moved for the imposition of the receivership in order to complete the cleanup necessary to prevent additional harm to the public, the State anticipated that the receiver would coordinate the efforts of tree distinct groups: Kovacs, the Ohio EPA, and the generators* of the waste at the site. The State expected the receiver to persuade the generators to voluntarily remove their wastes from the site to a licensed disposal facility; the Ohio EPA would provide for environmental monitoring of the site; and Kovacs would provide for the incidentals of site operation, including construction and repair of fences to keep out children and other curious people, the installation of fire alarms, a night security force, etc., and the disposal of wastes which had been mixed on the site in such a manner that the wastes could not be traced to a particular generator. For example, many of the waste materials of which Kovacs disposed by pouring them on the ground. (See Appendix M, JA-33) could no longer be traced to specific generators. The removal of the soil which was laden with chemicals which could not be traced to specific generator would thus be Kovacs' responsibility.

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* "Generators" means the companies whose manufacturing and industrial processes generated the hazardous waste illegally stored at the site. The generators paid Kovacs to dispose of their waste at lawful disposal sites. Instead, Kovacs stored or disposed of the materials at the Chem-Dyne site in Hamilton, Ohio.

It was for the purpose of eliciting Kovacs' participation in his share of the endeavor which would prevent any further harm to the public that the State, on September 12, 1980, moved for a hearing in the Common Pleas Court to determine the status of Kovacs' current assets. Kovacs then moved the Bankruptcy Court for an order preventing the State from going forward with the hearing. Kovacs alleged that the State court proceeding was subject to the Bankruptcy Code's automatic stay. When the Bankruptcy Court ruled in *Kovacs'* favor on the stay issue in *Kovacs I*, the State then filed the adversary complaint to determine non-dischargeability which gave rise to this case.

2. Kovacs' contribution to the task of the receivership was to effectuate the clean-up of the Chem-Dyne site ordered by the Common Pleas Court, not as an alternative to the performance of the injunctions contained in the July 18, 1979, Stipulation and Judgment Entry.

Based upon the foregoing and the analysis of the legislative history of the Bankruptcy Code provided earlier in this brief, Ohio submits that Kovacs' duty to comply with the Common Pleas Court's injunction to abate the continuing peril to public health and safety at the Chem-Dyne site is not within the Code's definition of "claim". The basis for the State's position is that there exists no right to payment which may be made by Kovacs or received by the State as an alternative to performance of the environmental cleanup mandated by the court. Rather, any expenditure by Kovacs is to assist in the performance of the hazardous waste cleanup, not as an alternative to abating the threat to the citizens of Hamilton, Ohio.

The absence of any right in Kovacs to make a monetary payment in lieu of performance or the State to accept

such a payment in lieu of performance is repeatedly evident in the record. First, the July 18, 1979, Judgment Entry of the Common Pleas Court provides Kovacs with no alternative to performance of the Chem-Dyne cleanup. (Appendix G, A-43-51). A review of that document establishes that the injunctions contained therein are absolute and unconditional. Kovacs is ordered to refrain from causing water pollution and nuisance conditions by removing the hazardous chemical wastes from the site in Hamilton, Ohio. Nowhere in the Judgment Entry is Kovacs given a choice between removing the chemicals and paying a sum of money to the treasury of the State of Ohio while leaving the hazardous materials on site to pose a continuing peril to the citizens of Hamilton. Futhermore, nothing in the Judgment Entry allows the State of Ohio to accept a payment of money in lieu of abatement of the public health hazard. Instead, the injunctions are absolutely clear and unequivocal. Kovacs is to remove the chemicals which present a peril to the citizens of Hamilton, Ohio, not pay an amount into the state treasury which may benefit all Ohioans generally but does nothing for the people of Hamilton. It is important to appreciate the fact that the purpose of the injunction against Kovacs was to prevent further harm to the citizens of Hamilton, not to provide the State with a pecuniary gain.

In addition to the plain language of the July 18, 1979 order, no other provision of Ohio law allows Kovacs to make a monetary payment in lieu of abating the threat to the safety of Hamilton. Indeed, the State is aware of no law in Ohio or anywhere in the United States which holds that a person against whom an injunction has been issued to abate a public health hazard can avoid his duty to abate the hazard by paying a sum of money to the state treasury while leaving the hazard unabated. No person may purchase the right to create a public health hazard or cause water pollution and threaten the lives of others. Indeed, the very suggestion that someone may purchase the right to violate state law and endanger the lives of others must be emphatically rejected.

The reality of the situation is that there is no alternative to performance of the injunction to abate the peril to the people of Hamilton. Kovacs can make no payment to anyone and thereby leave the continuing threat to the citizens of Ohio unabated. Rather, any expenditure by Kovacs goes to the receivership to assist in the cleanup. Therefore, it is clear that Kovacs' duty to comply with the Common Pleas Court's injunction mandating the Chem-Dyne cleanup and the injunction requiring Kovacs to assist the receiver in completing the abatement project do not provide for any form of payment as an alternative to completion of the Chem-dyne cleanup as ordered by the Common Pleas Court.

In conclusion, the legislative history of the Bankruptcy Code establishes that an equitable obligation is to be treated as a claim only if the obligation arises from a breach of performance and there exists a right of payment as an alternative to performance of the equitable obligation. Kovacs' obligation in the case at bar meets neither of the criteria necessary to classify it as a claim: Kovacs' obligation established in the Common Pleas Court's injunction to abate the hazard at the Chem-Dyne site arises from his violations of Ohio's environmental laws, not a mere breach of performance; and any expenditure which Kovacs would make to assist the receivership is not as an alternative to performance of the injunctions issued by the state court but rather to facilitate the performance of the cleanup mandated by the injunctions. Therefore, Kovacs' obligation to comply with the Common Pleas Court's injunction to clean up the Chem-Dyne site is neither a "debt" nor a "claim" susceptible to discharge in bankruptcy. Any other conclusion leads to the result that Kovacs is allowed to walk away from his responsibility to abate a threat to public health and safety, and a continuing nuisance, which still exists at this very time. (Appendix M, JA-33-34).

II. THE DECISION BELOW REFUSES TO IMPLEMENT THE EXPRESS WILL OF CONGRESS CONCERNING THE SCOPE OF DISCHARGE WHICH IS APPLICABLE TO EQUITABLE OBLIGATIONS.

A. The Sixth Circuit Disregarded The Policy Decision Made By Congress Concerning The Extent To Which Equitable Obligations Are Dischargeable In Bankruptcy.

While it is clear that Congress expressly declined to extend the scope of discharge to include injunctive relief such as involved in the case at bar, the decision below refuses to implement that Congressional policy determination. The Sixth Circuit made no attempt to examine the distinction between a mere breach of performance of a contract and a violation of a duty imposed by a regulatory statute. The decision below shows no appreciation of the fact that any expenditure by Kovacs is not as an alternative to performance of the injunctions, but rather, to implement the acts mandated by the state court injunction. Instead, the Court of Appeals chose to rely upon the rationale of its decision in *Kovacs I* which was vacated by this Court.

The rationale of the Court of Appeals decision is contained at 717 F. 2d 987-988 (A-7 through A-10). The court below labeled as "futile" Ohio's reliance upon the remarks of Representative Edwards and Senator DeConcini, the sponsors of the legislation, that discharge applies only to those equitable obligations which may be satisfied by an alternative right to payment in lieu of performance. The court then continued as follows:

> Ohio does not suggest that Kovacs is capable of personally cleaning up the environmental damage he may have caused. Ohio claims there is no alternative right to payment,

> but when Kovacs failed to perform, state law gave a receiver total control over all Kovacs' assets. . . . In reality, the only type of performance in which Ohio is now interested is a money payment *to effectuate the Chem-Dyne cleanup.*

717 F. 2d at 987 (Emphasis supplied).

Thus, the court of appeals expressly recognized that any expenditure made by Kovacs would not be as an alternative to performance of the cleanup, but rather was to implement the cleanup. The court then relied upon the rationale of *Kovacs I* that Ohio was seeking to compel William Kovacs to spend money.[10] *Id.* at 988. What the court refused to recognize, however, is that since Ohio is seeking to compel Kovacs to make expenditures to "effectuate" performance of the cleanup rather than as an alternative to performance, Congress has expressly placed such obligations outside the scope of discharge.

In essence, the decision below contravenes some of the most basic principles of statutory construction established by this Court. In *National Woodwork Manufacturers' Association v. National Labor Relations Board*, 386 U.S. 612, 640 (1967), *rehearing denied*, 387 U.S. 926 (1967), this Court noted that the statements in the legislative history made by the sponsors of legislation, such as Representative Edwards and Senator DeConcini

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[10]There is some language in the decision, *id.* at 988, concerning a monetary claim which the State may some day make for environmental damage due to Kovacs' failure to clean up the Chem-Dyne site. The court correctly notes that the discharge of such a claim would be determined pursuant to 11 U.S.C. section 523. The court does not seem to appreciate, however, that such a claim is not involved in this case. Ohio's adversary complaint to determine non-dischargeability strictly relates to Kovacs' duty to clean up the site pursuant to the state court injunction, not to a monetary claim to the State resulting from that failure. See Appendix E, A-29-A-37.

in the case at bar, are of particular importance in determining legislative intent. Even more to the point is the Court's observation in *United States v. Emmons*, 410 U.S. 396, 404, fn. 14 (1973) that:

> Surely an interpretation placed by the sponsor of a bill on the very language subsequently adopted by Congress cannot be dismissed out of hand. . . .

Yet this is exactly what happened below. The court of appeals dismissed "out of hand" the explanations of Representative Edwards and Senator DeConcini that the compromise language actually enacted by Congress limited the scope of discharge of equitable obligations to those which include a right of payment as an alternative to performance rather than, as in the case at bar, expenditures to effectuate performance.

In addition, the decision below disregards this Court's repeated holdings that the courts should not interpret statutes to create results which Congress specifically rejected. *Gulf Oil Corporation v. Copp Co.*, 419 U.S. 186, 200 (1974); *Sinclair Refining Co. v. Atkinson*, supra, at 214-215; *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 125-126 (1942). As the legislative history of the Bankruptcy Code clearly establishes, Congress specifically rejected inclusion of all equitable obligations within the scope of discharge. Rather, Congress determined that only those equitable obligations which may be satisfied by an alternative right to payment in lieu of performance could be discharged. In other words, Congress clearly distinguished between those obligations which require the performance of an act whether or not funds must be spent to accomplish those acts, and injunctions which really involve making a monetary profit and which can be satisfied by the payment of money rather than the performance of the act.

B. The Rationale Of The Sixth Circuit's Decision Would Effectively Destroy Ohio's Ability To Protect Its Citizens From Future Harm Caused By A Continuing Threat Which Resulted From Violations Of Ohio's Environmental Laws.

The Decision below expressly readopted the rationale of *Kovacs I*, supra, at 456, that an injunction to perform an act which necessitates the expenditure of money in order to accomplish its performance is really "in essence" a money judgment.[11] Thus, as it did in *Kovacs I*, the Sixth Circuit again expressly disregarded the distinction drawn by Congress between police power enforcement actions which seek the performance of an act necessary to protect the public interest, and those situations in which the government is acting merely as a common creditor seeking to protect its own pecuniary interests rather than attempting to prevent or abate harm to the public.

The Sixth Circuit's approach in this case was emphatically rejected by a recent decision of the Third Circuit, *Penn Terra Limited v. Department of Environmental Resources*, unreported, Case No. 83-5448 (April 30, 1984). The Third Circuit carefully reviewed both the legislative history of the Code and the Sixth Circuit's rationale in the *Kovacs* cases. The Third Circuit then declared that:

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[11] Since the Sixth Circuit voluntarily readopted the rationale of *Kovacs I* as the basis for its opinion in this case, it becomes necessary to examine the error in that prior decision involving the applicability of the automatic stay even though this Court vacated that prior decision and *Kovacs I* now remains pending before the Sixth Circuit which has not taken any action whatsoever on that case since the remand from this Court sixteen (16) months ago.

> We find, however, that the definition of "money judgment" implied in *Kovacs . . . is* unduly broad. *Were we to find that any order which requires the expenditure of money is a "money judgment," then the exception to section 362 for government police action, which should be construed broadly, would instead be narrowed into virtual nonexistence. Yet we cannot ignore the fundamental fact that, in contemporary times, almost everything costs something. An injunction which does not compel some expenditure* or loss of monies may often be an effective nullity.***

Id. at 22-23 (Emphasis supplied).

Ohio submits that the thoughtful, analytical approach of the Third Circuit demonstrated in the *Penn Terra* decision is of far greater persuasive value than the abbreviated analysis of the subject performed by the Sixth Circuit in the *Kovacs* cases. In addition, the Third Circuit's approach is consistent with other federal appellate decisions which treat a "money judgment" as an order to pay a sum certain, rather than an order to perform an act. *United States Fidelity and Guaranty Co. v. Ft. Misery Highway Dt.*, 22 F. 2d 369, 372-373 (9th Cir. 1927); *Fuller v. Aylesworth*, 75 F. 694, 701 (6th Cir. 1896).

Finally, the Third Circuit's approach is consistent with the reality of the situation in both *Penn Terra* and in the case at bar. In both *Penn Terra* and in the instant matter, the order sought to be enforced "was not intended to provide compensation for past injuries". *Id*, at 24. In both cases, the "Court's injunction was meant to prevent future harm to, and to restore, the environment". *Id*. Indeed, the orders which Pennsylvania and Ohio were attempting to

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**Footnote omitted.

enforce were the same kind of injunctions as were at issue in *United States v. Price*, 688 F. 2d 204, 212 (3rd Cir. 1982), i.e., mandatory injunctions requiring the performance of acts which necessitate the expenditure of funds but which have, as their purpose, the prevention of future, additional environmental harm. The point cannot be overemphasized that the net effect of the decision below is that it would allow bankruptcy courts to excuse violators of law from the responsibility to abate ongoing incidents of pollution, despite the fact that such abatement is necessary in order to prevent serious additional future harm to innocent members of the public.

The case at bar involves the performance of an act which must be performed, abating a peril to the health and safety of the citizens of Hamilton, Ohio. There is no alternative. Ohio is not involved in this matter "for the money". Its concern is not to make a profit. Rather, Ohio's concern is to save lives. Thus, the injunctions at issue are outside of the scope of discharge established by Congress. The decision below, however, refuses to implement the policy judgment made by Congress and instead attempts to reshape the Bankruptcy Code in a manner which is more acceptable to the court below. As this Court noted, however, in *Sinclair Refining Co., supra* at 215:

> In dealing with problems of interpretation and application of federal statutes, we have no power to change deliberate choices of legislative policy that Congress has made within its constitutional powers. Where Congressional intent is discernible—and here it seems crystal clear—we must give effect to that intent.

In the case at bar the bankruptcy court, district court and court of appeals below all applied the Bankruptcy Code in the manner in which they preferred rather than as

established by Congress. The result of this disregard of a Congressional policy determination is that the use of injunctive relief by state and federal environmental enforcement officials to prevent future harm by abating ongoing violations is effectively destroyed. Therefore, the State of Ohio requests this Court to reverse the decision of the Sixth Circuit and hold that Kovacs' obligation to comply with the Common Pleas Court's injunction to abate the hazard at the Chem-Dyne site is not a "debt" or "claim" which is susceptible to discharge in bankrutpcy.

CONCLUSION

For all the foregoing reasons, Petitioner respectfully submits that the decision of the Court of Appeals should be reversed.

Respectfully submitted,

ANTHONY J. CELEBREZZE, JR.
Attorney General of Ohio

E. DENNIS MUCHNICKI
Assistant Attorney General

State Office Tower
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
(614) 466-2766

Counsel of Record for Petitioner

CERTIFICATE OF SERVICE

I certify that three copies of this Brief of Petitioner were mailed pursuant to Supreme Court Rule 28.3 by United States mail, first-class postage prepaid, this _____ day of May, 1984 to John A. Garretson, 118 S. Second Street, Hamilton, Ohio 45011, to William H. Eder and David M. Caldwell, 900 Tri-State Building, Cincinnati, Ohio 45202; to E. Hanlin Bavely, 604 Tri-State Building, Cincinnati, Ohio 45202.

E. DENNIS MUCHNICKI
Assistant Attorney General
Counsel of Record for Petitioner

RESPONDENT'S

BRIEF

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CASE NO. 83-1020

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

IN RE: WILLIAM LEE KOVACS,
Debtor,

STATE OF OHIO,
Petitioner-Appellant,

v.

WILLIAM LEE KOVACS, d/b/a B & W Enterprises; Hamilton Industrial Real Estate Company; Resort Rentals; and Whitco Enterprises,
Respondent-Appellee.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT

David A. Caldwell
900 Tri-State Building
Cincinnati, Ohio 45202
(513) 852-6031
Counsel of Record for Respondent

William H. Eder, Jr.
Jeffrey A. Marks
900 Tri-State Building
Cincinnati, Ohio 45202
Of Counsel for Respondent

COURT INDEX PRESS, INC. — 215 E. Ninth Street, Cincinnati, Ohio 45202 — (513) 241-1450

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COUNTERSTATEMENT OF QUESTION PRESENTED FOR REVIEW

Whether a Chapter 7 bankrupt debtor's pre-petition obligation to remove specified toxic waste materials from a waste storage site is a "debt" or "claim" within the meaning of 11 U.S.C. § 101(11), (4) where such obligation arose from an agreed settlement of a state court action; the removal has been completed and the cost ascertained.

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IN THE

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OCTOBER TERM, 1983

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IN RE: WILLIAM LEE KOVACS,
Debtor,

STATE OF OHIO,
Petitioner-Appellant,

v.

WILLIAM LEE KOVACS, d/b/a B & W Enterprises; Hamilton Industrial Real Estate Company; Resort Rentals; and Whitco Enterprises,
Respondent-Appellee.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT

COUNTERSTATEMENT OF THE CASE

On September 29, 1976, the State of Ohio filed suit in the Butler County, Ohio Court of Common Pleas, Case No. CV-76-09-0834, alleging that William Lee Kovacs, the debtor, and various business entities, including the Chem-

Dyne Corporation, had violated the environmental laws and regulations of Ohio in the operation of a toxic waste disposal business. After more than two years of negotiations, the State and Kovacs reached agreement on a settlement of all disputes. The settlement agreement took the form of a "Stipulation and Judgment Entry" which was filed in that case on July 18, 1979. (Appendix "G" A43-51).

In the agreed entry under finding No. 7, Kovacs and the other defendants estimated that there were 850,000 gallons of liquid waste and 4,000 barrels of solid or semi-solid waste stored on the site. Although that Entry denied liability on behalf of all defendants for any alleged violations of Ohio's environmental laws, it did require the debtor and other defendants to (1) stop polluting at the Chem-Dyne facilities; (2) remove and dispose of the waste stored on the site "as described in Finding No. Seven (7)"; and (3) pay $75,000 to Ohio's Division of Wildlife as compensation for fish killed.

Arguing that the debtor and other defendants had not complied with the requirements of the July 18, 1979, Stipulation and Judgment Entry, Ohio filed a motion in the state court seeking the appointment of a receiver and, on February 4, 1980, Judge Marrs of the Butler County Common Pleas Court issued an order appointing a receiver over the assets of the debtor and the other defendant business entities associated with him. (Appendix "I" A-57).

That order appointed Jack Zettler as receiver over the assets of the debtor and associated business entities and, *inter alia*, ordered the debtor to turn over to the receiver all of his nonexempt assets. Additionally, the order directed the receiver to take "complete and exclusive control, possession and custody of all assets and property" of the

defendants, including Kovacs, and to use those assets as expeditiously as possible in order to effect compliance with the July 18, 1979, Stipulation and Judgment Entry. Further, the order required the debtor and other defendant business entities to cooperate fully with the receiver until he had fulfilled all of his duties as set forth in the appointment order.

On July 17, 1980, William Lee Kovacs, the debtor, filed a petition for reorganization under Chapter 11 of the Bankruptcy Code. After he determined that the cooperation and vote of the governmental environmental agencies would be required in order to have a feasible plan of reorganization approved, and that such cooperation and vote would not be forthcoming, the debtor filed an application to convert to straight bankruptcy under Chapter 7 of the Bankruptcy Code. An order adjudicating the debtor a bankrupt and directing bankruptcy was entered by the United States Bankruptcy Court, Southern District of Ohio, on September 2, 1980.

On September 12, 1980, Ohio filed a motion in the state court action requesting a hearing to determine whether the debtor had additional assets which could be used to pay the receiver a portion of the debtor's post-petition personal earnings for the purpose of effectuating the cleanup of the Chem-Dyne facilities. The debtor then requested a stay of those state court proceedings pursuant to 11 U.S.C. § 362 and that stay was granted by the Bankruptcy Court, which decision subsequently was affirmed by both the United States District Court for the Southern District of Ohio and the Court of Appeals for the Sixth Circuit. Ohio then filed a Petition for Writ of Certiorari with this Court, which vacated the decision and remanded it for further consideration of mootness. *State of Ohio* v.

Kovacs, 681 F.2d 454 (6th Cir. 1982), vacated and remanded for further consideration, — U.S. —, 103 S.Ct. 810 (1983).

On October 20, 1980, Ohio filed a complaint in Bankruptcy Case No. 1-80-01499 seeking an order of the Bankruptcy Court that, *inter alia*, the obligations of the debtor to remove all waste stored at the Chem-Dyne facilities were not subject to discharge pursuant to 11 U.S.C. § 727. Rather than arguing that the obligations imposed on the debtor were nondischargeable as a result of some specific exception to discharge set forth in the Bankruptcy Code, Ohio argued that the obligations imposed on the debtor in the Stipulation and Judgment Entry entered by the state court do not involve claims or debts as defined in the Bankruptcy Code, and that only obligations involving debts or claims are dischargeable in bankruptcy.[1]

The debtor and Ohio then executed an agreed stipulation of facts, which was filed in the Bankruptcy Court on July 29, 1981. (Appendix "F" A-58). In September, 1981, Ohio filed a motion for summary judgment requesting an order of the Bankruptcy Court that the obligations imposed on the debtor by the Common Pleas Court were nondischargeable as a matter of law. The Honorable Burton Perlman, United States Bankruptcy Judge, ruled on February 23, 1982, that the motion for summary judgment should be denied because the obligations at issue were dischargeable in bankruptcy. (Appendix "C" A-17). A

[1] Ohio admits that the portion of the judgment entry requiring the debtor to pay $75,000 to Ohio's Department of Natural Resources constitutes a money judgment which is dischargable in bankruptcy. No claim has been made that the debtor is in violation of the injunction against further pollution since he has been out of possession of the site since the appointment of the receiver.

final judgment in favor of the debtor was entered on March 30, 1982, and that judgment was affirmed by the United States District Court for the Southern District of Ohio on September 17, 1982. (Appendix "B" A-11). Ohio then appealed to the Court of Appeals for the Sixth Circuit, which affirmed the District Court's opinion on September 11, 1983. That decision *Ohio ex rel.* v. *Kovacs, et al.*, 717 F.2d 984 (6th Cir. 1983) (Appendix "D" A-27) of the Sixth Circuit is the subject of this appeal.

On April 27, 1983 the U.S. Army Corps of Engineers issued a notice to proceed on contract to OH Materials Co. division of KBI Corp. (Appendix "O" JA36). This contract called for the total surface cleanup of the Chem-Dyne facility. This work represented the same performance agreed upon by Kovacs in the July 18, 1979 Stipulation and Judgment Entry. (Appendix "G" A-43). As of December 22, 1983 the total surface cleanup of the facility was completed and no chemical, containers, or other items holding chemicals or other waste remain on the site.

The cost of the cleanup contract was paid by the U.S. utilizing funds from the "Superfund" established pursuant to CERCLA 42 U.S.C. § 9601 *et seq*. Part or all of this cost was recouped by the U.S. through settlements obtained from toxic waste generating companies named defendants in an action styled *United States vs. Chem-Dyne Corp., et al.*, U.S. Dist. Ct. S.D. Ohio No. C-1-82-840.

SUMMARY OF ARGUMENT

I. The obligation of William Kovacs arose from the negotiated settlement of a civil action brought by the State of Ohio. That settlement was set forth in a "Stipulation and Judgment Entry" entered on July 18, 1979. As pertinent to this Appeal, the entry required Kovacs to remove certain specified amounts of industrial waste stored on the site. Due to Kovacs' alleged failure to perform the settlement, the state court appointed a receiver on February 4, 1980, granting the receiver possession of all the assets of Kovacs and his related entities. The receiver was ordered to perform the waste removal which had previously been agreed upon by Kovacs. The present appeal arises from the attempt by the State of Ohio to collect money from Kovacs to be paid into the receivership to pay for the cost of the clean-up. Such a claim for money involves no equitable remedy or injunctive relief and clearly constitutes a "claim" or "debt" dischargeable under the Bankruptcy Code.

II. The decision of the Court of Appeals does not in any way impair the ability of the State of Ohio to enforce its environmental laws or constitute an infringement of the State's police power. Through prohibitory injunctions and receivership, the State of Ohio has succeeded to date in the enforcement of its environmental laws. Since February 4, 1980 the State has been in constructive possession of the premises through the state court receiver and has had full power and authority to take whatever action it deems necessary. What the state is seeking here is not enforcement of its environmental laws, but the collection of money from a bankrupt debtor. The claim is one for indemnity not police power enforcement and is therefore dischargeable under the Bankruptcy Code.

III. Kovacs' specific obligation under the July 18, 1979 settlement entry was to remove specified amounts of industrial waste stored on the surface of the site. The February 4, 1980 receivership barred Kovacs from possession of the site and in effect superseded any injunctive effect of the July 18, 1979 judgment entry. Thereafter the removal of the toxic waste was performed, using funds supplied by the U.S. which had been obtained through the settlement of claims against the generators of the toxic waste. The obligation of Kovacs has thus been performed and any claim for indemnity belongs to the United States and/or the generators of the toxic waste; not the State of Ohio. In any event, such a claim is clearly a simple money claim dischargeable in bankruptcy. The specific claim asserted by the State of Ohio has therefore become moot and no case or controversy exists before this court.

ARGUMENT

I. THE OBLIGATION OF WILLIAM KOVACS TO REMOVE THE TOXIC WASTE SPECIFIED IN THE AGREED JUDGMENT IS A "DEBT" AND A "CLAIM" WITHIN THE MEANING OF 11 U.S.C. § 101(11) and (4) AND IS, THEREFORE, DISCHARGEABLE IN BANKRUPTCY.

Section 101 (11) of the Bankruptcy Code defines "debt" as a "liability on a claim." "Claim" is defined in § 101 (4) of the Bankruptcy Code as follows:

> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured . . .

11 U.S.C. § 523 governs the dischargeability of debts and provides nine specific exceptions in which a discharge does not discharge a debtor from a specific debt. Realizing that Congress has not provided a specific exception for the claim involved here, Ohio instead argues that the obligation of Kovacs under the agreed judgment entry is nondischargeable because it is neither a "claim" nor a "debt" as defined in the Bankruptcy Code. According to Ohio, this obligation is not a claim or a debt because Kovacs' failure to perform does not give rise to any right to payment. That argument flies in the face of both applicable law and the reality of the extensive efforts of the State of Ohio to obtain money from Kovacs to complete the Chem-Dyne cleanup.

Ohio states the particular question involved in this case as "whether the obligation to comply with an injunction to abate a threat to public health and safety which has issued by state court in an action brought by state officials to enforce state environmental laws may be discharged in bankruptcy."

This argument is based on a poor memory of the facts. The July 18, 1979 "Stipulation and Judgment Entry" represented the settlement of a disputed civil action. While the Entry used the word "ordered", it is obvious from subsequent events that the Entry was nothing more than the contract of Kovacs to do certain things and pay certain monies in return for a complete release from any further

obligation as to the issues involved in the lawsuit. In fact, the State so characterizes the Entry at page 26 of its Brief as being, "in full satisfaction of all his potential liabilities at the Chem-Dyne site."

In January of 1980, when it appeared to the State that Kovacs was not proceeding to remove the stored hazardous waste, it moved in the State Court for the appointment of a receiver. In its Memorandum in support of the motion, the State relied upon Ohio Revised Code § 2735.01 which provides in substance that a receiver may be appointed "after judgment, to carry the judgment into effect." This Memorandum appears as Exhibit "E" to the Stipulation upon which this case was originally tried in the Bankruptcy Court and is part of the record. It is extremely significant that the State took this action rather than seeking a contempt finding. The effect, of course, was that all of the assets of Kovacs and his related companies were taken over by the receiver and used to pay the cost of the waste removal. In view of this chain of events, it is difficult to come to any other conclusion than that the July 18, 1979 Judgment Entry was, in effect, a money judgment.

In any event, it is clear that any injunctive effect contained in the July 18, 1979 Judgment Entry has been totally superseded by the order appointing the receiver. That order had the effect of barring Kovacs from the premises and it is foolish and irresponsible to argue that today he is under an injunction to remove hazardous waste materials from the site. The conclusion that this ouligation represents nothing more than the obligation to pay money is further reinforced by the State's efforts to seek his post-petition earnings to help pay the cost of cleanup.

The State's reliance on the legislative history of 11 U.S.C. § 101 (4) is futile and unconvincing. The amendments

adopted during the legislative proceedings merely demonstrate that Congress was careful not to relieve a debtor from the obligation of prohibitive injunctions. An example would be an injunction ordering the debtor to refrain from further acts of pollution. Obviously, in that case, there is no alternate right to payment and the obligation of the injunction is not discharged in bankruptcy.

No one seriously suggests that Kovacs is capable of personally removing the toxic waste from the site. Common sense tells us that this action would involve contracting with others and paying money for the performance of the contract. Ohio claims there is no alternate right to payment but when Kovacs failed to perform, a State Court receiver took total control of all of Kovacs' assets. Ohio later used State law to attempt to discover Kovacs' post-petition income in an apparent attempt to levy on his future earnings. In view of the present state of facts, a reversal by this Court of the lower court's judgment could result in nothing more than the State's further attempt to collect a money judgment.

The State and the *amici* place great reliance on the recent unreported decision rendered in the Third Circuit, *Penn Terra Limited* v. *Department of Environmental Resources*, Case No. 83-5448 (April 30, 1984). However, the facts of *Penn Terra* make it totally inapplicable to the present case. In *Penn Terra* the debtor was a corporation which had previously been engaged in coal mining. Shortly after the filing of a Chapter 7 petition in bankruptcy, the State commenced an action for an injunction in State Court to enforce a prior settlement agreement requiring the corporate debtor to perform certain backfilling of the abandoned mining site. The injunction was sought against the debtor and its bankruptcy trustee and could

thus have only been implemented out of the funds of the debtor's estate. The case involves the applicability of the automatic stay provision provided in 11 U.S.C. § 362, not the question of dischargeability. In fact, the case can have no effect on the question of dischargeability since a corporation does not receive a discharge in bankruptcy. *See* 11 U.S.C. § 727 (a) (1). *Penn Terra* simply holds that the State may enforce a mandatory injunction against the debtor's estate requiring the expenditure of estate funds. It certainly does not hold that the State may pursue an individual debtor for the rest of his life in an effort to obtain his post-petition earnings. No reported case makes such a holding.

The Third Circuit itself recognized the distinction between the issues of *Penn Terra* and this case:

> "Kovacs II [This case] was concerned with whether Kovacs' obligation under the state court order met the statutory definitions of 'claim or debt' as set forth in 11 U.S.C. § 101 (4) and (11). The State of Ohio contended that the obligation did not qualify as a claim or debt and therefore was not dischargeable in bankruptcy. Kovacs II held that Ohio essentially was seeking to obtain a money payment from Kovacs and affirmed Kovacs' discharge. Thus, since different policies and considerations were involved, we are not prepared to declare that our decision is in conflict with Kovacs II . . . ."

11 U.S.C. § 523 sets forth nine specific types of debts which are not discharged in the bankruptcy of an individual debtor. While the State concedes that its claim is not specifically excepted under this Section, an examination of the Section does tend to indicate that Congress did not intend to except from discharge the claim involved in this case. Section 523 (a) (7) excepts from discharge the following:

(7) to the extent such a debt is a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than a tax penalty. . .

The State concedes that the claim here is not a "fine, penalty, or forfeiture." It is, however, significant that Congress specifically excepted a specific type of governmental claim yet made no exception for the claim involved here. Clearly, under the principle of *expressio unius est exclusio alterius*, an environmental claim for cleanup costs is not excepted from discharge in bankruptcy.

II. THE DECISION OF THE COURT OF APPEALS DOES NOT IN ANY WAY IMPAIR THE POWER OR ABILITY OF THE STATE OF OHIO TO ENFORCE ITS ENVIRONMENTAL LAWS.

The State of Ohio and the *amici* have argued in a lengthy but illogical fashion that the decision of the Court of Appeals seriously impairs the ability of the State and federal government to enforce its environmental laws. A brief review of past events demonstrates this contention to be ludicrous. In a relatively short period of time, the State of Ohio succeeded in putting Mr. Kovacs out of business and giving a State Court receiver possession of all of his assets. As explained in more detail under Argument III below, the State and the federal government have also obtained the necessary funds from the toxic waste generators and accomplished everything that Kovacs agreed to do.

There is no issue in this case as to the power of the State to enjoin continuing acts of pollution and to shut down unlawful operations. There is likewise no contention by

anyone that Kovacs continued any of these acts after the State Court receiver took over his premises. In fact, this case does not involve any issue of environmental law. Instead, it involves a much more basic human issue; namely whether Kovacs will receive the benefit of a "fresh start" as contemplated by the Bankruptcy Code. The alternative is that the State of Ohio will be given the unprecedented authority to pursue Mr. Kovacs for the rest of his life in an attempt to garnish his wages to satisfy a monetary claim involving several million dollars. It is difficult to find a worthwhile public purpose supporting such a holding.

The decision of the Court below does not in any way conflict with cases such as *In the matter of Canarico Quarries, Inc.*, 466 F. Supp. 1333 (D.P.R. 1979); *U.S.* v. *Price*, 688 F.2d 204 (3rd Cir. 1982); *United States* v. *Republic Steel Corporation*, 362 U.S. 482 (1960); *In re: Vermont Real Estate Investment Trust*, 25 BR 804 and cases of similar import. All of these cases involve continuing industrial operations either under Chapter 11 of the Bankruptcy Code or a non-bankruptcy situation. They merely stand for the proposition that if a debtor-in-possession or other corporation is going to continue to operate, it cannot operate in violation of state law. Those holdings do not in any way reach the issue of dischargeability involved in this case.

In another novel but unpersuasive argument, the State contends that the claim involved here is not a "claim" or "debt" under the Bankruptcy Code because it arises from a violation of law. This is a rather irresponsible conclusion in view of the fact that the State has never brought criminal charges against Kovacs nor has the Court below made any determination of criminal violation in the civil action. The specific obligation at issue here arises from the July 18, 1979 consent Judgment Entry which specifically denies such allegations and sets forth the obligation as an agreed settle-

ment of a civil dispute. Aside from that fact, there is no general principle of law that claims arising from violations of law are nondischargeable in bankruptcy. With the exception of certain types of fraudulently contracted debts, theft and willful and malicious injury, *see* 11 U.S.C. § 523(a)(2), (4) and (6), such claims, even though arising from a criminal violation, are dischargeable. An obvious example is a wrongful death claim arising from the commission of a negligent homicide or other traffic violation.

Cases such as *U.S.* v. *Carson*, 669 F.2d 216 (5th Cir. 1982), do not hold to the contrary. Those cases all involve actual criminal convictions where a court has ordered restitution to a crime victim as a condition of probation. In that case, the restitution order is actually part of the criminal sentence and is thus nondischargeable. Those cases do not hold that the crime victim's individual claim is necessarily nondischargeable. In any event, there has been no criminal conviction here nor has there been a sentence including an order of restitution.

The State also argues that Kovacs' failure to remove the toxic waste as ordered on July 18, 1979 constitutes criminal contempt under Ohio Revised Code Chapter 2705. There has, of course, never been a charge of contempt or such a finding. In any event, such a finding would not necessarily be criminal contempt. Where the sentence of the court is designed to secure compliance with the order it is considered civil rather than criminal contempt. *See, e.g., Brown* v. *Executive 200, Inc.*, 64 Ohio St. 2d 250 (1980). This holding is in accord with federal authority on the subject. In *Parker* v. *United States*, 153 F.2d 66 (1st Cir. 1946), the contempt proceedings grew out of a suit for injunction brought by the U.S. under the Agricultural Marketing

Agreement Act of 1937. The court found Parker in civil contempt and imposed a compensatory fine equal to the payments required under the Act. On failure to pay, he was committed to jail. Thereafter, Parker filed bankruptcy and moved for termination of the commitment. The Court of Appeals found that the compensatory fine was a "debt" within the meaning of the Bankruptcy Act and discharged Parker. Considering the fact that Kovacs has been out of possession of the premises since the appointment of the receiver, and the fact that the cleanup which he agreed to perform is completed, the only court order which could be imposed upon him would involve the payment of money. Under the holding in *Parker*, this would clearly be dischargeable.

Although engaging in his usual verbal gymnastics, the Attorney General essentially admits this at page 35 of his Brief:

> It was for the purpose of eliciting Kovacs' participation in his share of the endeavor which would prevent any further harm to the public that the State, on September 12, 1980, moved for a hearing in the Common Pleas Court to determine the status of Kovacs' current assets.

Stripped of the evasive language, the State admits that it was seeking an order for Kovacs to pay money into the receivership. Whether this is an equitable remedy or money judgment, it is clearly dischargeable.

At page 26 of its Brief, the State attempts to analogize the 1979 settlement entry with an order of criminal restitution. In support of this ridiculous argument, the State suggests that Kovacs accepted the settlement "as a means of avoiding the imprisonment which could follow if Ohio did initiate a criminal prosecution." This statement is not only ludicrous

it is shocking. Whatever motive Kovacs may have had in settling the case, it is clear that the Attorney General may not bargain away the State's power and duty to commence criminal prosecutions. In fact, had any such thing taken place, the Attorney General would have been guilty of an offense known in Ohio as "compounding a crime" punishable as a first degree misdemeanor under Ohio Revised Code § 2921.21. If the State of Ohio ever thought they had sufficient evidence to support a criminal prosecution against Kovacs individually, we would assume they would have commenced such a prosecution rather than bargain it away in the settlement of a civil action. In any event, the Statute of Limitations has long since run on such a prosecution. (Ohio Revised Code § 2901.13).

In a further unsuccessful attempt to analogize this case with a criminal prosecution, the State cites *Younger* v. *Harris*, 401 U.S. 37 (1971); *Huffman* v. *Pursue Limited*, 420 U.S. 592 (1975); and *Trainor* v. *Hernandez*, 431 U.S. 434 (1977). Each of these cases involves an attempt by a defendant to obtain a federal court injunction against a state court prosecution of either a criminal action or civil action to enjoin a nuisance where it was alleged that such prosecution was based on an unconstitutional statute. These cases all follow the well-known principle that federal courts will not in the first instance interfere with state court jurisdiction purely on constitutional grounds. This involves the question of exhaustion of state remedies by way of appeal. The cases can have no application whatsoever in a bankruptcy situation either on the question of the automatic stay or the question of dischargeability.

III. THE OBLIGATION OF WILLIAM KOVACS TO REMOVE TOXIC WASTE FROM THE CHEM-DYNE SITE HAS BEEN PERFORMED AND THIS CASE IS, THEREFORE, MOOT.

The exercise of judicial power under Article III of the Constitution depends upon the existence of a case or controversy. As this Court noted in *North Carolina* v. *Rice*, 404 U.S. 244 (1971), a federal court is without power to render advisory opinions or "to decide questions that cannot affect the rights of litigants in the case before them." Its judgments must resolve "a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Ibid.* quoting *Aetna Life Insurance Company* v. *Haysworth*, 300 U.S. 227, 241 (1973). As the Court noted in *Steffel* v. *Thompson*, 415 U.S. 452, 459 (1974), "[t]he rule in federal cases is that an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed."

As relevant to this appeal, Kovacs' initial obligation arose from the following provisions of the July 18, 1979 agreed Judgment Entry. (Appendix "G" A-45):

> (7) The defendants currently estimate that they have the following amounts of industrial waste and/or other waste stored at their facilities at 500 Ford Boulevard: 850,000 gallons in liquid form and 4,000 barrels of solid or semi-solid sludges.
>
> (8) Plaintiff and defendants are entering into this Stipulation and Judgment Entry in order to compromise all disputes and/or claims or causes of action asserted in the complaint or which could have been asserted by the plaintiffs to the date hereof arising from any action or actions of the defendants.

> (3) Within twelve (12) months of the signing of this order, the defendants and their employees and agents are to remove and dispose of all industrial wastes and/or other waste as described in Finding No. Seven (7) from the premises at 500 Ford Boulevard. The removal is to be accomplished at the rate of a net reduction of 75,000 gallons of liquids and 340 drums of solid and semi-solid sludges per month. Compliance with this schedule shall be determined every three (3) months on the basis of the average rate of reduction over the previous three months except that during the last three months the net rate of reduction must proceed at a rate of at least 75,000 gallons of liquid and 340 drums of solid and semi-solid sludge in each month.

The State in its Brief has carefully avoided quoting this exact language, arguing that Kovacs was ordered to "clean-up the Chem-Dyne chemical waste storage site."

From the specific language used in the actual Judgment Entry, it is clear that the State settled for the removal of those specific waste materials stored on the surface of the site. The uncontradicted affidavit of Kenneth E. Zimmerman of the U.S. Army Corps of Engineers (Appendix "O" JA36) establishes that all of these materials were removed before December 22, 1983. This work was performed by OH Materials Company Division of KBI Corporation pursuant to a contract with the U.S. Army Corps of Engineers. Through the affidavit of David Strayer, (Appendix "M" JA33), the State seeks to show that there exists soil and ground water contamination under the site. It is difficult to understand the relevancy of this fact, if it is a fact. The point is that the State settled for the removal of the waste materials stored on the surface of the site. The State acknowledges that this was a binding agreement and the Judgment Entry so states. The State cannot now be heard to claim something additional.

There is a further reason why this case is moot. As demonstrated by the affidavit of Kenneth E. Zimmerman, (Appendix "O" JA36), the funds for the cleanup contract came from the federal government, not the State of Ohio. Those funds were obtained by the United States in an action styled *United States of America* v. *Chem-Dyne Corporation, et al.*, U.S. District Court for the Southern District of Ohio, Case No. C-1-82-840. This action was brought against Chem-Dyne, related defendants and also numerous corporations who were alleged to have generated the toxic waste ultimately stored at the Chem-Dyne site. The specific funds arose from a settlement with a number of the companies. The suit remains pending against those companies not settling. In any event, any claim against William Kovacs for the cost of the performance of the cleanup does not belong to the State of Ohio. It either belongs to the United States who is not a party to this action, or the settling companies by way of indemnity. Such a claim, if it exists, is clearly a money claim and is dischargeable in bankruptcy.

A further reason supports the conclusion that this case is moot. The order appointing the receiver, entered on February 4, 1980, (Appendix "J" JA4), grants the receiver possession of all of the property of Chem-Dyne, Kovacs, and all the related companies. The Entry further ordered the receiver to comply with all of the orders contained in the Judgment Entry of July 18, 1979. The only obligation imposed upon Kovacs following the turnover to the receiver was an injunction to "cooperate fully with the receiver in the performance of such duties or the exercise of such powers." In a characteristic exercise of literary license, the State argues that Kovacs was ordered to "assist" the receiver. (Brief, pages 32, 35 and 37). This word does not appear in the order and the Court should not be misled by counsel for the State.

The order to cooperate with the receiver could hardly be interpreted to mean pay money into the receivership. Even if it did, the State's argument would be self-defeating because we would then clearly have merely a money judgment which is dischargeable in bankruptcy. There has never been a claim that Kovacs failed to "cooperate" with the receiver and, in fact, no cooperation was ever requested. So far as the question of mootness is concerned, the important fact is that the order appointing the receiver clearly superseded any injunctive orders contained in the July 18, 1979 Judgment Entry and Kovacs clearly could not be charged with contempt for any failure to perform under that order.

CONCLUSION

Although it has been necessary to respond to the many diverse and strained arguments propounded by the State, we need only look at the operative fact which commenced this controversy in the federal court: the September 12, 1980 motion by the State for a hearing to determine whether Kovacs had any additional assets which could be collected by the receiver. No amount of argument can change the fact that this was a direct attempt to collect money from the bankrupt, not to command performance of any act. Clearly, this is a dischargeable debt or claim.

No issue as to the enforcement of environmental laws is presented by this case. Throughout the progress of this case, the environmental laws of the State of Ohio have been consistently enforced to the point of putting Kovacs out of business and taking all of his property from him. The only real question involved in the case is whether this Court will create a special exception to the Bankruptcy Code in derogation of the stated policy of Congress to provide a "fresh start" for the bankrupt debtor.

Respectfully submitted,

David A. Caldwell
900 Tri-State Building
Cincinnati, Ohio 45202
(513) 852-6031
Counsel of Record for Respondent

William H. Eder, Jr.
Jeffrey A. Marks
900 Tri-State Building
Cincinnati, Ohio 45202
Of Counsel for Respondent

CERTIFICATE OF SERVICE

I hereby certify that three copies of this Brief of Respondent were mailed pursuant to Supreme Court Rule 28.5 by United States mail first class postage prepaid this ..... day of June, 1984 to E. Dennis Muchnicki, Assistant Attorney General, State Office Tower, 30 E. Broad Street, 17th Floor, Columbus, Ohio 43215, Howard J. Wein, Assistant Counsel, Pennsylvania Department of Environmental Resources, 1503 Highland Building, 121 South Highland Avenue, Pittsburgh, Pennsylvania, 15206-5988, Rex E. Lee, Solicitor General, Department of Justice, Washington, D.C. 20550, John A. Garretson, 118 South Second Street, Hamilton, Ohio 45011, E. Hanlin Bavely, 604 Tri-State Building, Cincinnati, Ohio 45202 and Lawrence R. Velvel, State & Local Legal Center, 444 N. Capitol Street, N.W., Suite 349, Washington, D.C. 20001.

David A. Caldwell
Counsel of Record for Respondent

AMICUS CURIAE

BRIEF

SEP 21 1984

No. 83-1020

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF OHIO,

Petitioner,

vs.

WILLIAM LEE KOVACS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THOMAS J. O'NEILL, TRUSTEE IN BANKRUPTCY OF QUANTA RESOURCES CORPORATION, DEBTOR, AS *AMICUS CURIAE*

THOMAS J. O'NEILL, ESQ.
Counsel for Trustee in Bankruptcy of Quanta Resources Corporation as Amicus Curiae

Of Counsel:

NOLAN, O'NEILL & MOORE
60 Park Place
Newark, New Jersey 07102
(201) 643-6300

BEST AVAILABLE COPY

In the

Supreme Court of the United States

October Term, 1984

No. 83-1020

State of Ohio,

Petitioner,

vs.

William Lee Kovacs,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

MOTION OF THOMAS J. O'NEILL, TRUSTEE IN BANKRUPTCY OF QUANTA RESOURCES CORPORATION, DEBTOR, FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Thomas J. O'Neill, Trustee in Bankruptcy of Quanta Resources Corporation, Debtor, hereby moves, pursuant to Rule 42 of this Court, for leave to file the annexed brief as *amicus curiae* urging the Court to dismiss the writ of certiorari as improvidently granted or to vacate the judgment of the Court of Appeals for the Sixth Circuit and remand the cause for further proceedings. Consent of William Lee Kovacs, the Respondent, has been obtained. The consent of the Petitioner has been requested but was not granted.

Thomas J. O'Neill is the Trustee in Bankruptcy of Quanta Resources Corporation, a Delaware corporation which engaged in the recycling of waste oil, operating facilities in New York and New Jersey. Included in the debtor's estate were two facilities, one in New York and one in New Jersey, where substantial quantities of waste oil, contaminated with PCB's, were stored. The question of who is responsible for disposal of the contaminated oil and cleanup of the site is still being litigated among the Trustee, secured and unsecured creditors, administrative claimants, and the States of New York and New Jersey. As such, Thomas J. O'Neill has a vital interest in the relationship between the bankruptcy and environmental laws of the United States and the several States.

Thomas J. O'Neill recognizes that his motion for leave to file the annexed brief as *amicus curiae* is untimely under the rules of this Court and that this Court generally denies such untimely motions. This delay is explained, however, by the time taken to locate facts asserted by petitioner and the United States in another federal court, which facts had not been brought to the attention of this Court and which directly bear on the issue before the Court, and because the decision of the Third Circuit on the Trustee's application to abandon the facilities was not announced until July 20, 1984. In the instant case, moreover, the interests of justice will be ill-served if the Court denies the motion.

Because of the potential impact of this case on the Quanta case, Thomas J. O'Neill has followed and studied the case closely. He has learned that the petitioner and *amici* in support of petitioner have not brought to the Court's attention all the facts necessary for disposition of this case, in particular, events that have transpired since certiorari was granted that likely have rendered the case moot. The discovery and development of such facts and

events required substantial time and effort, and Thomas J. O'Neill was unable previously to move the Court for leave to file his brief as *amicus curiae*.

This Court long ago held that in rendering a decision, it is bound to consider "any change, either in fact or in law, which has supervened since the judgment (below) was entered." *Patterson* v. *Alabama*, 294 U.S. 600, 607 (1935). The Court also has held that changes in fact that may render the case moot may be brought to the Court's attention by third parties whose interests may be affected by the Court's decision, *Lord* v. *Veazie*, 49 U.S. (8 How.) 251 (1850), or by *amici curiae*, *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U.S. 346 (1922), and that such changes may be shown to the Court at any time before the decision of the case. *Little* v. *Bowers*, 134 U.S. 547 (1890); *see also Furness, Withy & Co.* v. *Yang-Tsze Insurance Association*, 242 U.S. 430 (1917).

Thomas J. O'Neill respectfully submits the annexed brief as *amicus* to apprise the Court of changes in facts that require the Court's attention and to explain why *amicus* believes the changes in fact to be of critical importance to this case. Thomas J. O'Neill and other bankruptcy trustees have an abiding interest in the issues in this case; the resolution of the issues purportedly presented by this case will have a substantial impact on trustees in bankruptcy. Thomas J. O'Neill therefore is concerned that these issues be resolved only when it is appropriate to do so. He urges the Court to grant his untimely motion, under long-standing Court practice, and to consider the facts and arguments *amicus* sets forth in order to avoid a decision on an improper basis.

WHEREFORE, Thomas J. O'Neill, respectfully moves the Court for leave to file the annexed brief as *amicus curiae*.

Dated: September 21, 1984

Respectfully submitted,

/s/ THOMAS J. O'NEILL

.....

THOMAS J. O'NEILL

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IN THE

Supreme Court of the United States

October Term, 1984

No. 83-1020

STATE OF OHIO,

Petitioner,

vs.

WILLIAM LEE KOVACS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THOMAS J. O'NEILL, TRUSTEE IN BANKRUPTCY OF QUANTA RESOURCES CORPORATION, DEBTOR, AS *AMICUS CURIAE*

Preliminary Statement

Thomas J. O'Neill, Trustee in Bankruptcy of Quanta Resources Corporation, Debtor ("Quanta"), submits this brief as *amicus curiae*, urging the Court to dismiss the writ of certiorari as improvidently granted or to vacate the judgment of the United States Court of Appeals for the Sixth Circuit in *In re Kovacs*, 717 F.2d 984 (6th Cir. 1983), and remand the cause for further proceedings.

Interest of *Amicus Curiae*

Thomas J. O'Neill is an attorney at law of the State of New Jersey who serves on the panel of trustees in bankruptcy established by the Honorable Hugh M. Leonard, U. S. Trustee. Thomas J. O'Neill presently is serving as Trustee in Bankruptcy of Quanta, a company which engaged in the business of waste oil treatment and recycling. The debtor corporation operated waste oil facilities in New York and New Jersey. At the time of the appointment of the Trustee, there remained substantial quantities of waste oil contaminated with PCB's at each site. The States of New York and New Jersey have sought to compel the Trustee to clean up the sites. Although the Bankruptcy Court permitted the Trustee to abandon the sites pursuant to Section 554 of the Bankruptcy Code, which decision was upheld on appeal by the District Court, the Third Circuit recently reversed the decisions of the Bankruptcy Court and District Court and remanded the case. *In the Matter of Quanta Resources Corp.*, (3rd Cir. Case No. 83-5142, July 20, 1984); *In re: Quanta Resources Corporation*, (3rd Cir. Case No. 83-5730, July 20, 1984).

Interested as he is in both environmental and bankruptcy laws, *amicus* believes that major controverted issues touching on both areas of the law should be resolved only under appropriate circumstances, circumstances in which the full impact of a decision can be known. As set forth *infra*, the sparse record before this Court provides an inadequate basis for resolution of the important issue petitioner would have the Court address. In fact, the case may be moot. *Amicus* urges the Court to defer decision on the issue until a more appropriate case presents itself, a case in which the impact on *amicus* and others can be adequately evaluated.

Statement of Supplementary Facts Necessary for Disposition of the Case

The petitioner and supporting *amici* raise a broad question for review by this Court. That question, if actually presented by the facts, would be important. There are, however, substantial reasons why this Court cannot and should not address this question as to which certiorari was granted. None of these reasons has been brought to the Court's attention by the parties or *amici*.

None of the parties has informed this Court (or any of the courts below) of proceedings occuring in federal court which alter the relationship of petitioner, respondent, and the United States. The underlying premise giving rise to the dispute between petitioner and respondent now before this Court has been fundamently changed by subsequent events. As set forth below, the comprehensive cleanup of the toxic dump site at issue has been undertaken, not by the petitioner, but by the United States utilizing the resources of the so-called Superfund; the United States, having a statutory claim,[1] has already sued and recovered much of the cost from co-generators, transporters, and receivers of toxic substances at this site, and the United States has sued many others, including respondent, for the remaining money due. Similarly, petitioner had to pay for a small portion of the cleanup conducted by the United States, and, like the United States, is asserting a federal statutory claim for damages for the cost of the cleanup it had to bear under the federal legislation. Moreover, the United States, contrary to the position advanced in this Court as an *amicus*,

---

[1] In view of the assertion of rights by the United States against many persons, including respondent, it is at least questionable whether the status of the United States in this case is as an *amicus* or as a *de facto* party.

has taken the position that the injunction underlying the judgment sought to be reviewed in this Court would not be effective in protecting the public health and safety.

In addition to the foregoing, the record of proceedings in the Bankruptcy Court shows that it was unnecessary and premature for the lower courts to address the issue of dischargability framed by petitioner. There has been no finding or determination that respondent has not fully complied with the underlying injunction. The record contains no material enlightment whatsoever concerning the financial condition of respondent, the status or content of any plan, and other matters pertinent to this petition.

A. Supplemental Facts Concerning Legal Proceedings By the United States and Petitioner

The factual presentations by petitioner and supporting *amici* do not mention or discuss subsequent administrative and judicial proceedings which fundamentally alter the relationship of the parties. These events occurred parallel with the proceedings in the courts below, but it appears that neither petitioner nor respondent so informed any of those courts. As set forth below, the congressional scheme for dealing with hazardous toxic waste dumps has been utilized at this particular dump site for almost two years: the Environmental Protection Agency ("EPA") utilized Superfund money immediately to clean up the surface of the site and to study what additional cleanup efforts are required; both the United States and petitioner have instituted suit under a federal statute to recover the costs of the cleanup. It is clear that both petitioner and the United States are proceeding in federal court to recover, under a federal statute giving an explicit claim for monetary relief, money judgments against numerous persons, including respondent.

On February 4, 1980, the Court of Common Pleas of Butler County, Ohio, appointed a receiver to take control of the waste disposal site that had been operated by respondent ("the Chem-Dyne site" or "the site"). The following supplemental facts are taken primarily from records filed by petitioner and the United States in proceedings in the United States District Court for the Southern District of Ohio, that now are consolidated as *United States* v. *Chem-Dyne, et al.*, No. C-1-82-840.[3]

Up to March of 1982, petitioner expended in excess of $421,000 to remove chemicals from the site and to prevent spills of hazardous wastes at the site. (Ohio Complaint at 29.) The EPA approved the measures petitioner undertook as not inconsistent with the National Contingency Plan promulgated by the EPA pursuant to Section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. Section 9605. (*Id.*) Petitioner therefore obtained under CERCLA partial reimbursement for its expenditures and petitioner is seeking further reimbursement to which it is entitled under the applicable provisions of CERCLA. (Settlement Agree-

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[3] As explained *infra*, Ohio and the United States brought separate actions against Chem-Dyne and a host of others for recovery of funds expended to clean up the site. On November 4, 1982, the two actions were consolidated under Docket Number C-1-82-840. The bulk of the facts recited below are taken from documents filed with the district court in the consolidated action. The documents are referred to by their number on the docket sheet in the consolidated action as follows: "Docket Entry ——— at—." Some of the facts below are from the complaint the petitioner, State of Ohio, filed before consolidation. Petitioner's complaint is designated "Ohio Complaint." The few remaining facts are taken from (1) the Joint Appendix ("JA") and briefs filed with this Court in the instant case, (2) public materials concerning the Chem-Dyne site cleanup, (3) the Preliminary Draft Feasibility Study Report on the site that the EPA's contractor recently issued, and (4) the Demand Letter the EPA sent to the defendants in the consolidated action and others on March 26, 1982 ("EPA Demand Letter").

ment Paragraph 1; Ohio Complaint; Docket Entry 18; Docket Entry 204.)

In early 1982, the EPA began to take charge of the clean-up operation at the Chem-Dyne site. (Docket Entry 204 at 31-33.) The EPA identified the persons responsible for generating the chemicals present at the site, transporting the chemicals to the site, or receiving the chemicals at the site. Such persons are liable as co-generators, transporters, or receivers for the cost of cleaning up the site, pursuant to the provisions of Section 107 of CERCLA, 42 U.S.C. Section 9607. The EPA identified 289 such companies. (Docket Entry 192 at 17.) On March 26, 1982, the EPA and petitioner separately sent letters to most of the 289 potentially liable companies demanding reimbursement of the cleanup costs pursuant to Section 112 of CERLA, 42 U.S.C. Section 9612. (Ohio Complaint at 30; EPA Demand Letter.)[1]

During the spring of 1982, the EPA assisted by petitioner, averted a threatened release of toxic chemicals at the site. (Docket Entry 204 at 31-32.) The EPA and petitioner drained and disposed of toxic chemicals from two pits at the site that were about to overflow as a result of rainfall. (*Id.*) The EPA and petitioner also responded to a release of chemicals and a threat of further release of chemicals from a bulk storage tank that had become corroded and had ruptured. (*Id.*) In so responding, approximately $50,000 of the funds of the Hazardous Substance Response Trust

[1] Such demand letters are the first step in the claims procedure the EPA generally follows to recover hazardous waste cleanup costs pursuant to Section 112 of CERCLA, 42 U.S.C. Section 9612. See generally Rikkers, *Negotiating Superfund Settlement Agreements*, 10 Environmental Affairs 697, 702-703 (1982-83); C. Price & L. Thoman, Cost Recovery Actions under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) (August 26, 1982) (unpublished EPA memorandum).

Fund (the "Superfund") established pursuant to Section 221 of CERCLA, 42 U.S.C. Section 9631, were expended. (*Id.*)

In August of 1982, the United States and 112 of the co-generators, transporters, and receivers (the "settling companies") entered into a settlement agreement. (*Id.* at 33-34.) Under the terms of the settlement agreement, the settling companies paid approximately $2.4 million to the United States. (Ward, *Settling at Chem-Dyne*, The Environmental Forum 7 (December 1982); *U.S. Sues Generators Who Refuse to Join in Chem-Dyne Cleanup Agreement*, Hazardous Waste Litigation Reporter 2,931-32 (Sept. 7, 1982).) In exchange, the United States agreed not to assert claims against the settling companies for reimbursement of the cost of performing a ground water and soil contamination study and disposing of materials contained in drums, tanks, or other containers on the surface of the Chem-Dyne site. (Docket Entry 204 at 33-34.) The United States reserved the right, however, to assert claims against the settling companies to recoup costs related to response, removal, remedial, or cleanup activities, or other relief from contamination of ground water; remedying soil contamination; and remedying surface water contamination arising out of or related to the presence, storage, treatment, handling, or disposal of wastes and other materials at the Chem-Dyne site. (*Id.*) Ninety percent of the $2.4 million was allocated to the United States and ten percent to petitioner because Section 104(c)(3) of CERCLA, 42 U.S.C. Section 9604(c)(3), requires that Superfund moneys will be expended for remedial action only if a state agrees to bear ten percent of the cost. (Settlement Agreement Paragraph 1.)

On August 26, 1982, the United States commenced an action in the United States District Court for the Southern District of Ohio against the non-settling companies, seek-

ing, among other things, reimbursement of Superfund moneys expended for the cleanup of the surface of the site. (Docket Entry 1.) The United States alleged claims under Sections 104, 106, and 107(a) of CERCLA, 42 U.S.C. Sections 9604, 9606, 9607(a), and Section 7003 of the Resource Conservation and Recovery Act of 1976, 42 U.S.C. Section 6973. On September 15, 1982, petitioner commenced a parallel action in the same court against the non-settling companies, seeking injunctive relief and reimbursement for funds expended to avert hazardous conditions at the site. (Ohio Complaint.) Petitioner's complaint alleged claims under Sections 107(a)(3) and 107(a)(4) of CERCLA, 42 U.S.C. Sections 107(a)(3), 107(a)(4), and the Ohio nuisance statute, as well as claims for negligent and reckless conduct and breach of a non-delegable duty to assure the safe and proper handling of hazardous wastes. (*Id.* at 30-38.)

In late 1982, the two actions were consolidated by Honorable Carl B. Rubin of the United States District Court for the Southern District of Ohio, who also ordered that liability for the comprehensive cleanup of the site, not just the surface cleanup, be determined in the consolidated proceeding. (Docket Entry 18.) A plan for the comprehensive cleanup of the chemicals on the surface of the site was prepared at a cost of approximately $282,805 paid for by Superfund moneys. (Docket Entry 204 at 32.) The cleanup of the surface of the site was completed by December 22, 1983. (*Id.*; JA36-37.) No chemicals, containers, or other items holding chemicals or other waste remain on the site. (JA36-37.) The EPA supervised the surface cleanup, funds for which came partially from the Superfund. (*Id.*; Docket Entry 204 at 32.) The total cost of the surface cleanup approached $3.4 million. (Ward, *supra*, at 7.)

Petitioner and *amici*, including the United States, argue in this Court that the original state court injunction against respondent is integral to the protection of the public health and safety. However, in the consolidated action referred to above, the United States asserts:

> The state court decree does not prohibit the shipment into Chem-Dyne of chemicals, does not prohibit the mixing of chemicals, does not provide for recontainerization of chemicals which are contained in rusted, damaged, or leaking drums, does not require sound handling, storage and operational practices and does not provide for environmental safe disposal, has not resulted in cleanup of the surface of the site, does not provide for abatement of soil and ground water contamination, has not been obeyed by the Chem-Dyne defendants, and would not completely protect the public health and the environment even if fully obeyed. (Docket Entry 204 at 31.)

On July 19, 1984, the contractor the EPA has hired to develop a plan for the comprehensive cleanup of the site issued a Preliminary Draft Feasibility Study Report on the site. This report presents several alternative strategies for "overall remediation" of the site. (*Id.*) Chief Judge Rubin has ordered the EPA to submit a final plan for the comprehensive cleanup by October 1, 1984, along with an estimate of the cost of the cleanup. (Docket Entry 446.)

The factual context and the issue raised by petitioner, and supported by the United States as *amicus*, is no longer presented by the actual factual situation. The petitioner is now suing numerous persons, including respondent, under 42 U.S.C. Section 9607 to recover the money it has to contribute, 42 U.S.C. Section 9604, to the cleanup being conducted by the EPA. The United States likewise is suing

for money which the Superfund has expended and will expend to clean up the site. Under the federal statute, petitioner and the United States can recover the moneys expended from all co-generaiors, transporters, or receivers —289 in number.

Therefore, even if one assumed that petitioner did not have a "claim" against respondent within the meaning of Section 101(4) of the Bankruptcy Code at the time petitioner commenced the declaratory proceeding in Bankruptcy Court two and a half years ago, the foregoing facts suggest th:. now petitioner is only seeking monetary relief.

B. The Inadequacy of the Record Before the Court

The record before the Court consists solely of the moving and response papers originally presented to the Bankruptcy Court on petitioner's adversary proceeding for declaratory relief of non-dischargeability and its motion for summary judgment. There is nothing in the record concerning the nature or posture of proceedings in bankruptcy court, the financial condition of respondent, or any plan of reorganization or liquidation. More important for the exercise of discretionary review by this Court are the absence of factual determinations by any court on crucial matters. Although petitioner's brief (and those of the *amici* including the United States) characterize the original injunction as broad (*e.g.* Brief of Petitioner at 6; Brief of United States as *Amicus Curiae* Supporting Petitioner at 3-4, 21), on its face that injunction only requires respondent to remove the drums from the site and to cease polluting (A-46 to A-50).[6] The Bankruptcy Court ruled that the appointment

[6] Petitioner and *amici* in support assert that the state court orders at issue required petitioner to "clean up the Chem-Dyne chemical

(footnote continued on following page)

of the receiver mooted the latter aspects of the injunction (A-20), an issue petitioner did not dispute on appeal. The drums, however, have been removed long ago (JA36; Docket Entry 204 at 32), a fact conceded by both petitioner and the United States in federal court. The factual issue of whether any obligation remains under the injunction has never been decided.

Yet the entire predicate of petitioner's case over the past years is that respondent still has some remaining obligation under the state court injunction. If no such obligation in fact remains, there is no cause to decide the legal question of whether an obligation under this injunction constitutes a "claim" under Section 101(4) or may be "discharged" under Section 727(b). It is inappropriate for this Court to have to make such a factual determination. Similarly, the Bankruptcy Court did not make any factual determinations concerning the nature of the injunction or the respondent's conduct or state of mind. Yet such findings could be highly pertinent to questions concerning dischargeability.

(footnote continued from preceding page)

waste storage site," to abate the environmental hazards at the site, and to assist the receiver who took possession of the site in the clean-up of the site. *See, e.g.*, Brief of Petitioner at i, 2, 3, 6, 20, 22, 31, 32, 35, 37; Brief of the United States as *Amicus Curiae* Supporting Petitioner at 1, 4, 21; Brief of Commonwealth of Pennsylvania and Thirty-One States as *Amici Curiae* at 3. However, the actual Judgment Entry (A-43 to A-51) provided only that respondent (1) remove and dispose of all industrial waste stored on the surface of the site, (2) not cause further water pollution as defined under the Ohio Revised Code, and (3) not cause further emission from the site of "noxious exhalation of noisome or offensive smells." (A-45 to A-47.) The subsequent order appointing the receiver did not modify these requirements; the order instructed the receiver only to comply with the above requirements. (A-52 to A-56.)

Summary of Argument

The record before the Court is an insufficient basis for resolution of the broad question purportedly presented by this case. There is virtually nothing before the Court concerning whether the injunctions petitioner seeks to enforce have been complied with. Petitioner and *amici* elsewhere have taken the position that the obligations under the injunctions have been performed and that compliance with the injunctions will not protect the health and safety of the public in the area of the site. In addition, on this record it appears that the Court of Appeals may not have had jurisdiction over the case and, thus, this Court's jurisdiction is in question as well.

The record before the Court is also devoid of facts concerning the underlying bankruptcy proceeding, facts that undeniably are relevant to this case. Further, although there are provisions of the Bankruptcy Code that may offer alternative bases for resolution of the case, as well as recently-enacted legislation that may cover the question involved here, findings concerning these provisions are not to be found in the record.

Finally, the claim of petitioner and *amici* to the contrary notwithstanding, the rule of decision sought by them may undermine their ability to enforce environmental laws.

The rule of decision also would impair the proper functioning of the bankruptcy laws, often rendering reorganization impossible and harming investors.

ARGUMENT

The Question Presented Cannot Be Decided on the Sparse Record Before the Court. The Parties Have Failed to Disclose to the Court Relevant Facts That Show That (1) the Case May Be Moot, (2) Other Grounds May Exist for Resolution of the Case, (3) the Lower Court May Not Have Had Jurisdiction of the Case, and (4) the Rule Sought by Petitioner and *Amici* Would Impair Bankruptcy Policy With No Corresponding Promotion of Environmental Policy.

The record before the Court is so utterly deficient in many important respects that, *amicus* respectfully suggests, this Court cannot, and should not, decide the question presented by petitioner. No one would dispute that environmental laws enacted by the States and Congress constitute significant policy decisions. Similarly, however, the bankruptcy laws enacted by Congress pursuant to Article I, Section 8, Clause 4 of the Constitution constitute significant policy decisions of no less importance or dignity. The question presented by petitioner assumes that a conflict between these policies actually exists and should be resolved in favor of petitioner's reference to the vague plethora of "health and safety laws." The factual record before the Court, however, does not disclose such a conflict. Indeed, the record is so barren that it is even uncertain whether the court below had jurisdiction to enter the order sought to be reviewed in this Court. Even if, however, the record were clear on certain factual matters related to the underlying injunction, the record is utterly devoid of any materials related to the underlying bankruptcy proceedings. In the absence of such materials, this Court does not have the benefit of a factual context in which to render a decision. As explained below, the consequences of the rule of decision urged by petitioner and *amici* may,

because of other provisions of the bankruptcy laws, defeat the "public health and safety" cause so vigorously advanced.

A. The Record Before this Court is Insufficient

The record before the Court consists of the moving and response papers on petitioner's motion for a declaratory judgment that petitioner did not have a "claim" against the estate. The only evidence (see A-18) offered was the underlying pleadings and stipulations in the state court proceeding. It is uncertain whether any hearing was held in the Bankruptcy Court. The only findings of fact made (see A-18 to A-19) recite matters contained in those pleadings and stipulations. None of the courts below raised the question of whether an actual controversy existed, *i.e.*, whether as a matter of fact the injunction has been satisfied, thereby rendering a declaratory judgment unnecessary or inappropriate. *See Aetna Life Insurance Co.* v. *Haworth*, 300 U.S. 227, 240-41 (1937).

There has been no determination that respondent has in fact any obligation under the injunction that either could or could not be discharged. If, as respondent asserts in his brief (Brief of Respondent at 17-19), he has complied with the injunction, the issue presented by petitioner would be moot, and should not be addressed by this Court. *E.g.*, *DeFunis* v. *Odegaard*, 416 U.S. 312, 316 (1974); *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971). If, as petitioner asserts (Brief of Petitioner at 31-35), obligations remain, the issue may not be moot. Although the surface has been cleaned up, petitioner's brief and an affidavit submitted by petitioner refer to soil and ground water pollution (*id.* at 34; JA36), an obligation not covered by the literal terms of the injunction (A-46 to A-47) and which the United States has conceded in federal court is not covered by the injunction. (Docket Entry 204 at 31.) However,

this Court has emphasized that it does "not grant certiorari to review evidence and discuss specific facts," *United States* v. *Johnston*, 268 U.S. 220, 227 (1925), or to make factual determinations, *Berenyi* v. *District Director, Immigration and Naturalization Service*, 385 U.S. 630, 636 (1967); *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U.S. 175, 178 (1938); *Southern Power Co.* v. *North Carolina Public Service Co.*, 263 U.S. 508, 509 (1924). In these circumstances, it is appropriate for this Court to dismiss the writ as improvidently granted, *e.g.*, *Minnick* v. *California Department of Corrections*, 452 U.S. 105, 127 (1981); *Belcher* v. *Stengel*, 429 U.S. 118 (1976); *Iowa Beef Packers, Inc.* v. *Thompson*, 405 U.S. 228 (1972); *Boatic* v. *United States*, 402 U.S. 547 (1971); *Piccirillo* v. *New York*, 400 U.S. 548 (1971); *Cowgill* v. *California*, 396 U.S. 371 (1970); *Conway* v. *California Adult Authority*, 396 U.S. 107 (1969); *Williams* v. *Zuckert*, 371 U.S. 531, *petition for rehearing granted*, 372 U.S. 765 (1963); *Rudolph* v. *United States*, 370 U.S. 269 (1962); *McCarthy* v. *Bruner*, 323 U.S. 673 (1944), or to remand, *e.g.*, *Patterson* v. *Warner*, 415 U.S. 303 (1974); *Spomer* v. *Littleton*, 414 U.S. 514 (1974); *Foley* v. *Blair & Co.*, 414 U.S. 212 (1973); *Taylor* v. *McElroy*, 360 U.S. 709 (1959); *Villa* v. *Van Schaick*, 299 U.S. 152 (1936).

In addition, the radically altered circumstances underlying this site and the apparent change in petitioner's demand for relief, described at pp. 9-11 *supra*, may well moot the issue. Court records indicate that the EPA, using Superfund money, has cleaned up the surface of the site, and has taken upon itself to conduct further efforts, the planning of which is substantially completed. More important, whatever may have been the situation in early 1982 when petitioner commenced the adversary proceeding in bankruptcy court, both petitioner and the United States are now suing many per-

sons, including respondent, under a federal statute for money judgments to recover the costs which the United States, and petitioner, have already incurred and will incur. Whether or not respondent's obligations, if any, to petitioner constituted a "claim" within the meaning of Section 101(4) of the Bankruptcy Code in 1980, 1981, or 1982, the changed circumstances, as a result of actions by the EPA under CERCLA and petitioner's subsequent claims for money damages, may well now constitute a "claim" even under the construction of Section 101(4) of the Bankruptcy Code proffered by petitioner and the United States. Such changed circumstances suggest dismissal of the writ as improvidently granted or remand. *See, e.g., Murel* v. *Baltimore City Criminal Court*, 407 U.S. 355 (1972); *Triangle Improvement Council* v. *Ritchie*, 402 U.S. 497 (1971); *Sanks* v. *Georgia*, 401 U.S. 144 (1971); *Taggart* v. *Weinacker's, Inc.*, 397 U.S. 223 (1970); *The Monrosa* v. *Carbon Black Export, Inc.*, 359 U.S. 180 (1959); *Parker* v. *County of Los Angeles*, 338 U.S. 327 (1949); *United States* v. *Alaska S. S. Co.*, 253 U.S. 113 (1920).

Finally, the record before the Court does not indicate that the Court of Appeals even had jurisdiction to enter the judgment to be reviewed by this Court. The Bankruptcy Court merely ruled, in the context of a motion for summary judgment in a declaratory judgment proceeding, that petitioner's claim was dischargable. Such an order is interlocutory, not a final order disposing of the entire bankruptcy proceeding. Although the District Court could have granted leave to appeal an interlocutory order, *see* 28 U.S.C. Section 1334(b), such an order would not be a "final order" appealable to a Court of Appeals. *See Catlin* v. *United States*, 324 U.S. 229 (1945); *Republic Natural Gas Co.* v. *Oklahoma*, 334 U.S. 62 (1948); *Gospel Army* v. *Los Angeles*, 331 U.S. 543 (1947); *Cobbledick* v. *United States*,

309 U.S. 323 (1940). The Court of Appeals did not discuss the basis of its appellate jurisdiction. If that court lacked jurisdiction, this Court should not address the merits. *United States* v. *Nixon*, 418 U.S. 683 (1974); *King Bridge Company* v. *Otoe County*, 120 U.S. 225 (1887). To hold, even *sub silentio*, that, no matter what the stage of the reorganization proceeding under Title 11, an order granting or denying dischargability of any claim is always appealable as of right as a "final order" is not consistent with this Court's decisions, *e.g., Market Street Railway Co.* v. *Railroad Commission of California*, 324 U.S. 548 (1945); *Republic Natural Gas Co.* v. *Oklahoma*, 334 U.S. 62 (1948); *Collins* v. *Miller*, 252 U.S. 364 (1920), and would needlessly burden appellate dockets.

B. The Record Before the Court is Insufficient to Evaluate the Supposed Policy

Petitioner and *amici* suggest that the question presented is essential to the enforcement of "public health and safety" regulatory schemes, and that the bankruptcy laws should not be used to evade these overriding concerns. Such is not the case. The meager factual record before the Court, and the almost hypothetical manner in which the question is presented, does not permit the proper consideration of the interrelationship of issues affecting the two bodies of jurisprudence. As set forth below, a complete record relating to the entire bankruptcy proceeding may well show that there is no such conflict.

The actual record does not even indicate the nature of the underlying bankruptcy proceeding. Apparently the respondent, as an individual, filed a petition under Chapter 11 of Title 11 which was, according to the Court of Appeals at least, later converted into a liquidation proceeding under Chapter 7 of Title 11. (A-3.) There is no factual record concerning respondent's assets or liabilities, the claims filed

against respondent, or even what plan, if any, has or might result. There is no record concerning purely bankruptcy matters which could moot the issue and avoid any supposed policy conflict. Moreover, even if petitioner were completely correct, another provision of the bankruptcy law, recently amended by Congress and not brought to this Court's attention by any of the parties, could render the effort by this Court illusory.

Petitioner requested a ruling that the injunctive obligation (assuming one still exists) is not a "claim" against the debtor under the Bankruptcy Code and is not dischargeable. In seeking a ruling that respondent's obligation was dischargeable, petitioner failed to address, as a matter of fact or of law, two other provisions of the bankruptcy law.

Section 523(a)(6) of Title 11 provides that "[a] discharge under Section 727, 1141, or 1328(b) of this title does *not* discharge an individual debtor from any debt . . . for willful and malicious injury by the debtor to another entity or to the property of another entity . . .." 11 U.S.C. Section 523(a)(6) (emphasis supplied).[8] If respondent, an individual, willfully caused the environmental harm the injunction was intended to remedy, Section 523(a)(6) could prevent a discharge. Similarly, Section 523(a)(7) of Title 11 could likewise prevent a discharge. That section provides that a discharge under Sections 727, 1141, or 1328(b) does *not* discharge an individual debtor from any debt "to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss . . .." *Id.* Any continuing obligation imposed on respondent by the injunction could be "a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit." Neither of these issues was ruled upon, nor were factual determinations made. It was inappropriate to determine that the obligation under the injunction was dischargeable without an appropriate factual record and consideration of these issues. Petitioner presumably would be satisfied, and given all the relief requested, by this result, without this Court having to decide the issue raised.

[8] The United States as *amicus* apparently concedes that Section 523(a)(6) could prevent a discharge. Brief for the United States as *Amicus Curiae* Supporting Petitioner, n. 19 at 19.

Even assuming this Court ruled in petitioner's favor, the ultimate result for petitioner would still be uncertain. Congress recently amended Section 502(c) of Title 11. This section, dealing with the allowance of claims or interests, provides that "[t]here shall be estimated for purpose of allowance" two things. One involves equitable rights, and the definition thereof under Section 502(c)(2)[9] was virtually identical to the definition under Section 101(4)(B).[10] However, the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, amended Section 502(c), effective October 8, 1984, to provide that there shall be estimated "any right to payment arising from a right to an equitable remedy for breach of performance." It is possible, therefore, that even if this petition prevailed on its view of "claim," the Bankruptcy Court may nevertheless have to make some monetary estimation, and provision in a plan for, any injunctive obligation. Such a change in the statutory scheme warrants this Court not addressing this

[9] "(c) There shall be estimated for purpose of allowance under this section —— (2) any right to an equitable remedy for breach of performance if such breach gives rise to a right of payment." 11 U.S.C. Section 502 (c)(2).

[10] "(4) claim means —— (B) right to an equitable remedy for breach of performance if such breach gives rise to a right of payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured . . .." 11 U.S.C. Section 101(4)(B).

issue, at least at this time. *Cf. Cook* v. *Hudson*, 429 U.S. 165 (1976); *Triangle Improvement Council* v. *Ritchie*, 402 U.S. 497 (1971); *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1955).

C. The Rule Advanced by Petitioner Would Undermine Bankruptcy Policy but not Advance Environmental Policy

The rule of decision sought by petitioner and *amici* is ill-considered. The rule of decision would impair greatly the functioning of the bankruptcy laws and contravene the congressional policy thereof. They ask the Court to rule that a debtor's obligations of any type under an injunction issued ostensibly to promote or protect "public health and safety" is not a "claim" within the meaning of Title 11 and therefore is not dischargeable in bankruptcy. Such a rule would have several undesirable side effects, particularly in the context of corporate liquidations and reorganizations.

This case apparently involves liquidation of an individual debtor. If any obligation under the injunction is not a "claim," petitioner apparently believes it can have some future recourse against this individual. (*Brief of Petitioner* at 37, 43-44.) However, to apply the rule sought by petitioner to the corporate context may well undermine the very policies urged by petitioner and *amici*. As applied to corporate liquidations in bankruptcy, the rule sought by petitioner and *amici* actually could undercut the ability of governmental entities to promote "public health and safety." In a liquidation proceeding, a corporation's assets are applied to pay the corporation's obligations. *See* 11 U.S.C. Section 726. Thus, if a corporation's obligation under a public health and safety injunction were not a "debt" of or "claim" against this corporation, the assets of a liquidated corporation would be used to pay creditors, *i.e.*, persons with "claims," and not to pay for compliance

with a prior injunction. Ironically, governmental entities thus would only be likely to obtain some measure of relief in the corporate liquidation context only if the compliance with an injunction is deemed a "claim."

The rule sought by petitioner and *amici* could seriously diminish the possibilities for successful corporate reorganizations under Chapter 11 reorganization proceedings. The purpose of corporate reorganization is to preserve the employment opportunity and economic value of a going concern by permitting it to restructure its financial obligations and to provide a plan to deal with those financial obligations. Under the rule petitioner and *amici* urge the Court to adopt, these requirements may well be prevented.

If governmental entities were given the opportunity to impose on corporate debtors a *de facto* financial obligation in the future but one which could not be dealt with in any manner under a plan of reorganization, that obligation would in effect constitute a super priority over all other corporate obligations save secured obligations. To reorganize, a corporate debtor must show that, under the plan of reorganization, it can meet its expected future obligations. 11 U.S.C. Section 1129. If future compliance costs were substantial, *bona fide* creditors would have the choice of either accepting voluntarily a reduction in their "claims" to permit a corporate debtor to pass the feasibility standards of 11 U.S.C. Section 1129, or proposing a plan of liquidation. Any governmental entity could have the ability to defeat a plan of reorganization merely by asserting prior to or during a reorganization proceeding that a debtor was in violation of a statute that promotes the "public health and safety"; by obtaining an injunction against the debtor which includes future compliance obligations requiring financial expenditures, any governmental entity could create on its own a first call on all unsecured

assets. The mere threat could inhibit the development of a consensual plan. The net effect could be to force corporate debtors to resort to liquidation instead of reorganization (to permit the possibility of a return to shareholders), or to make creditors insist on a liquidation, in order to avoid the future financial obligations, of "public health and safety" injunctions which would not be "claims" against the corporate debtor and therefore entitled to no share of the assets in liquidation. Such an effect would contravene Congress's express intent to encourage financially ailing entities to reorganize and re-enter the marketplace. *See generally* 5 *Collier on Bankruptcy*, Paragraph 1108.03 (15th ed. 1984). Notably, the effect of the opposite position—that compliance obligations under injunctions are "claims"—is not, as petitioner and *amici* imply, that the debtor can "walk away" from an injunction. To the contrary, future compliance costs, as allowed claims, would be quantified and allocated some of the debtor's resources.

Petitioner and *amici* fail also to address the impact the rule they seek would have on owners of securities of corporations in financial distress. Because provision for corporate equity carries a low priority in a liquidation, such holders naturally prefer reorganization to liquidation. *See* 11 U.S.C. Section 726. Because the rule sought by petitioner and *amici* would make corporate reorganization far more problematical in many cases and liquidations would occur with more frequency, securities owners would be adversely affected.

Amicus respectfully suggests that, if the issue has to be addressed at all by this Court, it should only be done on a full factual record. The bankruptcy laws do not necessarily conflict with "health and safety" laws. This Court cannot, on the record before it, cogently approach the question in a manner which weighs all appropriate considerations.

CONCLUSION

For the reasons set forth above, *amicus* Thomas J. O'Neill, Trustee in Bankruptcy of Quanta Resources Corporation, respectfully suggests that this Court cannot and should not decide the question as to which certiorari has been granted. The bankruptcy laws, like health, safety, and environmental laws, are of considerable societal importance. A full factual record, not merely sparse papers in a summary judgment motion in a single adversary proceeding for a declaratory judgment, may well dispell the appearance of conflict between different bodies of jurisprudence if indeed there is a present dispute between these parties. The petition for certiorari should be dismissed as improvidently granted, or the judgment below should be reversed and the cause vacated for further proceedings.

Dated: September 21, 1984

Respectfully submitted,

/s/ THOMAS J. O'NEILL

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THOMAS J. O'NEILL, *Trustee in Bankruptcy of Quanta Resources Corporation*

AMICUS CURIAE

BRIEF

CASE NO. 83 – 1020

In The
Supreme Court of the United States

OFFICE - Supreme Court, U.S.
FILED
OCT 3 1983
CLERK

OCTOBER TERM, 1983

IN RE: WILLIAM LEE KOVACS,

Debtor

STATE OF OHIO,

Petitioner-Appellant,

v.

WILLIAM LEE KOVACS, d/b/a, B & W Enterprises; Hamilton Industrial Real Estate Company; Resort Rentals; and Whitco Enterprises,

Respondent-Appellee.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONSE OF THE STATE OF OHIO TO MOTION BY THOMAS J. O'NEILL FOR LEAVE TO FILE AMICUS BRIEF OUT OF TIME

ANTHONY J. CELEBREZZE, JR.
Attorney General of Ohio

E. DENNIS MUCHNICKI
Assistant Attorney General
Counsel of Record

State Office Tower
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
(614) 466-2766

ATTORNEYS FOR PETITIONER

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RESPONSE OF THE STATE OF OHIO TO MOTION BY THOMAS J. O'NEILL FOR LEAVE TO FILE AMICUS BRIEF OUT OF TIME

Now comes the Petitioner, State of Ohio, and hereby objects to the motion of Thomas J. O'Neill to file out-of-time an *amicus curiae* brief in this case. As explained in more detail below, Ohio objects because the brief is both untimely and severely prejudicial to the State of Ohio because it is filed at so late a time in this proceeding as to deprive Ohio of the opportunity to provide a meaningful response to it.

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ARGUMENT

I. Trustee O'Neill Has Failed To Provide An Adequate Excuse For His Untimely Filing Of His Amicus Brief.

Rule 36.2 of the Rules of the Supreme Court of the United States clearly indicates that *amicus curiae* briefs must be filed within the time established for the filing of the brief of the party which the *amicus* supports. From what can be determined by a review of Trustee O'Neill's brief, it appears to be a brief which supports Respondent Kovacs. Respondent Kovacs' brief was due in this Court on approximately June 23, 1984. Trustee O'Neill did not file his brief, however, until September 25, 1984, over three (3) months beyond the deadline established for Respondent's brief in this case. Furthermore, the brief is filed only two (2) short weeks before the scheduled date for oral argument. Trustee O'Neill attempts to justify his eleventh-hour filing by a vague claim that it took him a long time to thoroughly research the facts of this case. This alleged excuse clearly does not justify filing a brief more than three months after the date by which it was due.

To begin with, Trustee O'Neill had more than an adequate period of time to make himself conversant with all the facts relating to the case at bar prior to the date by which Respondent's brief was due. It must be remembered that the litigation between Ohio and Kovacs came to national attention in November, 1982, when Ohio filed a petition for certiorari from the first decision of the Sixth Circuit in litigation between Ohio and Kovacs. *See, In re: Kovacs,* 681 Fed. 2d 454 (Sixth Cir. 1982), vacated and remanded for further consideration, _____ U.S. _____, 103 S. Ct. 810 (1983), (hereinafter *"Kovacs I"*). Ultimately the Supreme Court granted that petition for certiorari on January 26, 1983, vacated the decision of the Sixth Circuit, and remanded the matter for further consideration of the issue of mootness. The case at bar, *Kovacs II,* involves the Sixth Circuit's readoption of the rationale for its decision which was vacated by this Court in *Kovacs I.* Thus, Trustee O'Neill had *more than a year and one half* prior to the date by which a Respondent's brief was due in the present case to familiarize himself with all of the facts relating to Ohio's ongoing dispute with William Kovacs concerning Kovacs' obligation to abate the environmental hazard at the Chem-Dyne site. Furthermore, even if the date on which O'Neill received notice of this case is measured from the date of the filing of Ohio's second petition for certiorari, December 20, 1983, O'Neill still had six (6) months to familiarize

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Finally, even if O'Neill is correct in his claims that his factual research required additional time for him to file an *amicus* brief in support of respondent Kovacs, the proper procedure was for O'Neill to request Kovacs to obtain the necessary extension so that his brief could be filed in a timely manner or to file on his own behalf prior to the June 23, 1984 date for the filing of Respondent's brief a request for an extension of time. Rather then attempting to place the parties to this action and the Court on notice as to O'Neill's interest in this matter, however, O'Neill waited until more than three (3) months after the date by which a Respondent's brief is due and only two (2) short weeks prior to oral argument before filing his brief.

This Court has repeatedly recognized that a motion to file *amicus* briefs out-of-time will be denied. *Doran v. Salem Inn, Inc.*, 421 U.S. 927 (1975); *Wolff v. McDonnell*, 416 U.S. 966 (1974). In this case Trustee O'Neill has given no more than a conclusory, nonfactual explanation as to why he has requested to file a brief more than three months out of time and at such a late date that it is not physically possible for the Petitioner to reply. Thus, since O'Neill has provided no clear explanation for his lack of dilligence, Ohio submits that O'Neill's motion which does not comply with Rule 36.2 should be denied.

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The manner in which Trustee O'Neill has filed his brief in this case is severely prejudicial to the Petitioner. There are two (2) reasons why such prejudice will accrue to the State.

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> [T]he comprehensive cleanup of the toxic dump site at issue has been undertaken, not by the Petitioner, but by the United States utilizing the resources of the so-called Superfund. . . .

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> The Common Pleas Court of Butler County and its receiver should be free to continue to clean up the site. The United States of America should be free to pursue its remedies against any other person.

See *United States v. Chem-Dyne*, Case No. C-1-79-703 (August 6, 1981). In his decision of that date Judge Rubin specifically noted that an action in federal court pursuant to the Comprehensive Emergency Response, Compensation and Liability Act would not duplicate proceedings which were ongoing in the Butler County Court of Common Pleas.

In essence, Trustee's O'Neill's review of the file in the federal court cases has led him to numerous conclusions which are not accurate. If O'Neill's motion for leave is granted, Ohio would have to have the opportunity to respond to the plethora of inaccuracies in O'Neill's brief in order to effectively present its case in this Court. Because O'Neill's motion is filed at the very last minute, however, there does not remain adequate time between the date of O'Neill's filing and the date on which oral argument is scheduled so as to allow Ohio to prepare an effective response. Therefore, Trustee O'Neill's untimely motion is extremely prejudicial to the interests of the Petitioner, State of Ohio.

III. Participation As Amicus Curiae Is Not Necessary To Protect Trustee O'Neill's Interest In This Matter.

As clearly indicated on pages 20-22 of Trustee O'Neill's proposed brief, O'Neill does not have a direct interest in this case which involves an individual bankruptcy. Rather, O'Neill's concern involves corporate reorganizations. O'Neill may address those concerns by appealling from the decisions of the United States Court of Appeals for the Third Circuit which were adverse to Trustee O'Neill in the case, *In re: Quanta Resources*

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CONCLUSION

Since Trustee O'Neill's motion for leave is far out of time, and since the granting of O'Neill's motion would be severely prejudicial to the interests of Petitioner, and since O'Neill's participation in this case is not necessary to protect his interests, the Petitioner State of Ohio respectfully requests that this Court deny the motion of Trustee O'Neill for leave to file out of time his *amicus curiae* brief as Respondent in this case.

Respectfully submitted,

ANTHONY J. CELEBREZZE, JR.
Attorney General of Ohio

E. DENNIS MUCHNICKI
Assistant Attorney General
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State Office Tower
30 East Broad Street, 17th Floor
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ATTORNEYS FOR PETITIONER

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I certify that three copies of this Response of the State of Ohio to Motion By Thomas J. O'Neill For Leave to File Amicus Brief Out of Time, were mialed pursuant to Supreme Court Rule 28.3 by United States mail, first class postage prepaid, this _____ day of October, 1984, to: David A. Caldwell, 900 Tri-State Building, Cincinnati, Ohio 45202; Kathryn A. Oberly, Assistant to the Solicitor General, Department of Justice, Washington, D.C. 20530; Lawrence R. Velvel, Chief Counsel, State and Local Legal Center, 444 N. Capitol Street, N.W., Suite 349, Washington, D.C. 20001; Howard J. Wein, Assistant Counsel, Highland Building, 121 South Highland Avenue, Pittsburg, Pennsylvania 15229; and Thomas J. O'Neill, Esq., Nolan, O'Neill & Moore, 60 Park Place, Newark, New Jersey 07102.

E. DENNIS MUCHNICKI
Assistant Attorney General
Counsel of Record

MOTION

Supreme Court, U.S.
FILED
OCT 3 1984
ALEXANDER L. STEVAS
CLERK

CASE NO. 83 – 1020

In The
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OCTOBER TERM, 1983

IN RE: WILLIAM LEE KOVACS,
Debtor

STATE OF OHIO,
Petitioner-Appellant,

v.

WILLIAM LEE KOVACS, d/b/a, B & W Enterprises; Hamilton Industrial Real Estate Company; Resort Rentals; and Whitco Enterprises,
Respondent-Appellee.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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ATTORNEYS FOR PETITIONER

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REPLY

BRIEF

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Office-Supreme Court, U.S.
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Columbus, Ohio 43215
(614) 466-2766

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See Train Ship Building Corporation v. Shell
Oil Company, 444 U.S. 572 (1980) 15

United States v. Swift,
286 U.S. 106 (1932) 7

United States v. W.T. Grant Company,
345 U.S. 629 (1953) 11

Federal Statutes:

11 U.S.C. Section 362(b) 2, 14

28 U.S.C. Section 1334 14

State Statutes:

Ohio Revised Code Chapter 6111.01 (A) 13

Ohio Revised Code Chapter 6111.01 (H) 13

Miscellaneous:

46 Ohio Jurisprudence 2d, *Recievers*,
Section 43 (1961) 16, 17

INTRODUCTION

In its brief, Petitioner State of Ohio argued that Kovacs' duties to comply with the injunctions contained in the Butler County Court of Common Pleas' Stipulation and Judgment Entry are neither "claims" nor "debts" which are dischargeable in bankruptcy because any expenditure of funds made by Kovacs was to facilitate performance of the acts mandated by those injunctions rather than as an alternative to performance of the acts. In general, the arguments advanced by Respondent Kovacs in opposition to Ohio's contention are a series of unsupported misstatements. Little, if any, of Respondent Kovacs' brief is in any way relevant or responsive to Ohio's argument. Indeed, Kovacs even admits that "the extensive efforts of the State of Ohio" were made "to obtain money from Kovacs to *complete* the Chem-Dyne cleanup" rather than to obtain compensatory damages for past harm. (Respondent's Brief, p. 8). Thus, Kovacs is left with nothing more than the sweeping, unsupported contention that any obligation which involves the expenditure of money, including the obligation to abate a public health hazard, is dischargeable in bankruptcy. In making this argument, however, Kovacs runs head on into the decision of the Third Circuit, *Penn Terra Ltd. v. Department of Environmental Resources*, 733 F.2d 267 (3rd Cir. 1984), which expressly rejects the argument advanced by Kovacs and adopted by the Sixth Circuit below in the base at bar. While Kovacs attempts to distinguish *Penn Terra, supra*, from the case at bar, as will be established below, that attempt is woefully unsuccessful. After reviewing this conflict between the Third and Sixth Circuits, the State will then address many of Kovacs' misstatements and Kovacs' argument concerning mootness.

ARGUMENT

I. THE EXPENDITURE OF FUNDS TO PERFORM THE ACTS REQUIRED TO ABATE A PUBLIC HEALTH HAZARD DOES NOT CONSTITUTE A MONETARY OBLIGATION WHICH IS DISCHARGEABLE IN BANKRUPTCY.

The first decision made by the Sixth Circuit in litigation between Ohio and Kovacs was in the case, *In re Kovacs*, 681 F.2d 454 (Sixth Cir. 1982), *vacated and remanded*, 103 S. Ct. 810 (1983) (*Kovacs I*). That case concerned the question as to whether Ohio's effort to enforce the Butler County Court of Common Pleas' injunctions requiring the cleanup of the Chem-Dyne site were exempt from the Bankruptcy Code's automatic statutory stay pursuant to 11 U.S.C. Section 362(b)(5). The court held that since the state court's injunctions would have necessitated Kovacs to spend money to perform the acts required by the injunctions, the injunctions were "in essence" a money judgment. While the Sixth Circuit decision in *Kovacs I* was subsequently vacated by this Court, in *Kovacs II* the Sixth Circuit expressly readopted the "injunctions which require the expenditure of money are really money judgments" rationale of its prior decision in *Kovacs I*. The Third Circuit in *Penn Terra, supra*, was faced with a district court decision which was also based on the rationale of *Kovacs I*, i.e., an injunction which necessitated the expenditure of money was in essence a money judgment. Thus, in reversing the district court which expressly adopted the rationale of *Kovacs I*, Third Circuit specifically rejected the rationale of *Kovacs I* which was relied upon and readopted by the Sixth Circuit below in *Kovacs II*. Indeed, the Third Circuit expressly declared that:

> We find, however, that the definition of "money judgment" implied in *Kovacs* and adopted by the bankruptcy court is unduly broad.

Id. at 277.

In attempting to distinguish *Penn Terra, supra*, Kovacs places great weight on footnote 11 of the *Penn Terra* decision in which the Third Circuit does note a slight difference in context of the manner in which the question is presented in *Kovacs II* and the Third Circuit case. See Brief of Respondent Kovacs, pages 10-11. Not surprisingly, however, Kovacs overlooks the last sentence of footnote 11 in which the Third Circuit expressly indicates that to the extent the Sixth Circuit readopts the injunctions are really money judgments rationale, "[w]e would disagree with such a result." *Id.* at 277.

In addition, it is clear from the rest of the *Penn Terra* decision that the Third Circuit is expressly rejecting the argument that any injunction the performance of which requires an expenditure of money should be construed as a money judgment. Indeed, on page 278 of its decision the Third Circuit unambiguously declares that:

> [W]e cannot ignore the fundamental fact that in contemporary times, almost everything costs something. An injunction which does not compel some expenditure or loss of monies may often be an effective nullity.

Thus, this Court is faced with decisions of two different Circuits which clearly disagree as to whether the expenditures which must be made to implement an

injunction are to be treated as monetary obligations for bankruptcy purposes. In comparing the persuasive content of these decisions, Ohio wishes to draw this Court's attention to the reasoned, thorough analysis contained in *Penn Terra*, as compared to the cryptic, conclusory rationale in the decision below and Kovacs' brief. While the Third Circuit decision attempts to track and implement the Congressional intent behind the Bankruptcy Code, both the decision below and Kovacs' arguments completely disregard the legislative history of the Code. In addition, the Third Circuit wisely begins its analysis with a cautious attitude towards the creation of an unwarranted preemption of state police power while neither the Sixth Circuit nor Kovacs show any concern for the sweeping preemptive effect of the Sixth Circuit's approach.[1] Furthermore, while the Third Circuit's

[1]While Kovacs argues in his brief that the result reached by the Sixth Circuit has no effect on government police power authority, the outcry raised by the numerous federal, state and local entities which have filed *amicus curiae* briefs in this case demonstrates very clearly that the effect of the decision below is to severely curtail the ability of governments to protect the health and safety of the public. For example, while Kovacs argues on page 12 of his brief that Ohio was able to put him out of business as a result of his illegal activities, he totally overlooks the severe negative impact which the Sixth Circuit decision has on the ability of government to abate the hazard which was created as result of Kovacs' unlawful activities. While it is true that the federal Superfund accomplished in December, 1282, the removal from the surface of the Chem-Dyne site of the remaining hazardous chemicals which were still in containers on the surface of the site, that removable date was almost 3½ years after the date by which the state court had ordered Kovacs to complete the cleanup of the site. As a result, the citizens of Hamilton, Ohio, were exposed to toxic chemicals in their air and water for a period of over three (3) additional years. Only future epidemiological studies analyzing the increase in cancer rates, birth defects, etc., in the area around the Chem-Dyne facility will be able to quantify the extent to which the health of the citizens of Hamilton was adversely impacted by the irresponsible, lawless activities of William Kovacs. In essence, both Kovacs and the court below overlook the fact that stopping unlawful activities is only part of the job of protecting the public. Expeditiously abating the adverse effects upon public safety resulting from those unlawful activities is even more important.

approach recognizes that the bankruptcy laws must be blended and harmonized with the public interest in other subjects, both Kovacs and the Sixth Circuit treat the Bankruptcy Code as the supreme law which transcends the importance of all other laws.

Finally, the Third Circuit's approach, unlike that of the Sixth Circuit in *Kovacs II*, demonstrates a prudent concern for the need to protect the public health and safety from hazardous conditions which threaten that safety. As the Third Circuit noted, the enforcement of the state court injunction "was meant to prevent further harm to, and to restore, the environment." *Penn Terra, supra*, at 278. The Third Circuit understood that the Commonwealth of Pennsylvania was not involved in the environmental abatement to make a profit such as in the commercial world for which the Bankruptcy Code was developed. Similarly in the case at bar, Kovacs has admitted that Ohio was not seeking monetary compensation for past damages, but rather was attempting to abate the problem at the Chem-Dyne site so as to prevent further harm to the citizens of Hamilton in the future. Yet without so much as a single citation to a provision of the Bankruptcy Code or a citation to any statement in the legislative history of the Code, the Sixth Circuit and Kovacs adopted an interpretation of the Bankruptcy Code which allows bankruptcy courts to obstruct the efforts of government to require law breakers to abate the continuing hazards to the public which result from their unlawful conduct. The State of Ohio respectfully suggests that if Congress had intended to destory in so sweeping a manner the police power authority of federal, state and local governments, there would have been at least some reference to this in the legislative history. Far from indicating such an intent, however, every provision

of the legislative history which addresses the matter, as noted by the Third Circuit, indicates a Congressional intent to preserve the ability of government to protect public and health and the environment.[2]

Therefore, since the key distinction between the approach of the Third and Sixth Circuits to this issue is that the Third Circuit attempts to preserve the ability of government to require violators of law to abate continuing threats to public health, safety and the environment, the State of Ohio suggests that the decision below be reversed and this Court adopt the reasoning of the Third Circuit in *Penn Terra*, *supra*.

II. WILLIAM KOVACS IS PERSONALLY RESPONSIBLE FOR THE IMPLEMENTATION OF THE INJUNCTIONS CONTAINED IN THE STIPULATION AND JUDGMENT ENTRY OF THE BUTLER COUNTY COURT OF COMMON PLEAS.

In addition to his unsuccessful attempt to distinguish *Penn Terra*, *supra*, Kovacs' brief is replete with misstatements which severely distort the factual and legal context of this case. Ohio will now address some of the most egregious of those misstatements.

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[2] In a thorough analysis of numerous cases which discuss the exemptions from the automatic stay for government police power enforcement actions, the court in *Donovan v. TMC Industries, Ltd*, 20 B.R. 997, 1001 (N.D. Ga. 1982), concluded that the key distinction is between government conduct which merely furthers its own pecuniary interests and government conduct which is intended to abate violations of law and protect the public with this latter type of activity being protected from interference by the bankruptcy process.

To begin with, Kovacs argues on page 8 of his brief that the Common Pleas Court's Stipulation and Judgment Entry represents a mere contract between the State of Ohio and Kovacs, rather than a judicial decree. Ohio is frankly surprised that Kovacs would even advance such an argument. In *United States v. Swift*, 286 U.S. 106 (1932), this Court specifically declared that:

> We reject the argument. . . that a decree entered upon consent is to be treated as a contract and not as a judicial act. . . [I]n truth what was. . . adjudged was not a contract as to anyone.

Id. at 115. Thus, while it is certainly possible for two parties to settle a matter pursuant to a contract by which they dismiss a court action, that was not what happened in the case at bar. Rather, both parties consented to the entry of an order of the Court of Common Pleas of Butler County, Ohio, requiring Kovacs to perform certain acts. Pursuant to this Court's decision in *United States v. Swift*, *supra*, Kovacs' attempt to reconstruct the history of this case into a contractual dispute rather than one of defiance of a court order must be rejected.

Next Kovacs argues that the appointment of the state court receiver somehow transforms the Butler County Common Pleas Court injunction into a money judgment. It is interesting to note, however, that, as usual, Kovacs offers no legal authority to support his contention. The law is clearly to the contrary. As illustrated by the cases cited on page 33 of the Brief of Petitioner, a receivership is merely a means for implementing an injunction. In no way does it somehow transform an injunction into some other type of order. Indeed,

quite to the contrary of Kovacs' argument, the use of the receivership demonstrates Ohio's concern for the performance of the remedial acts required by the state court rather than a mere desire for financial enrichment.

A third significant misrepresentation is also contained on page 9 of Respondent's Brief. Kovacs argues that the effect of the appointment of the receivership was to bar him from the premises at the Chem-Dyne facility so that he is no longer responsible for the implementation of the injunctions contained in the Stipulation and Judgment Entry. Once again, Kovacs does not cite any authority for this unique proposition. Furthermore, a review of the provisions of the order appointing receiver (JA-4-JA-16) reveals that the order contains no provision which bars Kovacs from the Chem-Dyne premises. Quite to the contrary, the order appointing the receiver contains a specific injunction against Kovacs enjoining and ordering Kovacs to fully cooperate with the receiver in the removal of the materials from the site. (See JA-15, 2nd paragraph). Thus, far from excusing Kovacs from his obligation to abate the environmental hazard at the Chem-Dyne site, the state court's order appointing the receiver contained a specific injunction establishing upon Kovacs a continuing duty to eliminate the public health hazard which he created at the Chem-Dyne site. Indeed, Kovacs' interpretation suggests a result which even he knows is absurd. Specifically, the essence of Kovacs' argument is that as a result of his contemptuous refusal to implement the state court injunction, the state court intended to reward him by placing the burden of the cleanup on the receiver while freeing Kovacs to go on his merry way. Ohio respectfully suggests that if Kovacs really believes he was completely freed from any further obligations by the appointment of the receiver, Kovacs would be only too happy to appear before the state

court judge and have the fact confirmed. The fact that Kovacs has so ferociously fought every effort of the State to bring him before the Common Pleas Court clearly indicates his knowledge that the state court did not, by the appointment of the receiver, free Kovacs of his obligations under the Stipulation and Judgment Entry.

Still another of Kovacs' inaccurate representations concerns the claims made on pages 12 and 13 of Kovacs' brief that the Bankruptcy Court's order did not in any way limit the police power authority of Ohio because there are no continuing or ongoing violations at the Chem-Dyne site. This representation reflects the uni-dimensional view of state police power contained in the decision below. Stopping an unlawful activity is only one aspect of state police power enforcement. Frequently, however, an unlawful activity may set in motion forces which continue to present a threat to the public long after the unlawful activity itself has stopped. This is precisely the situation in the case at bar. While it is true that Kovacs has, at least for the time being, justifiably been removed from the hazardous waste business in the State of Ohio, the forces which he set in motion by his reckless dumping and operational practices during the time he operated the Chem-Dyne site still present a continuing threat to the citizens of Hamilton, Ohio. First, for almost four years after Kovacs was enjoined from creating a public health hazard, toxic chemicals remained in numerous containers throughout the Chem-Dyne site presenting a threat of explosions and toxic air pollution to the citizens of Hamilton. In addition, as reflected in the affidavit of David Strayer (JA-33), the soils of the Chem-Dyne site are now so thoroughly contaminated with toxic pollutants that they have created a severe groundwater pollution problem in the

area and are a potential source of contamination of the public water supply for the City of Hamilton. The State respectfully suggests that a critical element of its police power authority is to require Kovacs to abate the results of his unlawful conduct, and not merely to stop that unlawful conduct. *See Penn Terra*, at 278.

Still another specious contention advanced by Kovacs on page 14 of his brief is that as of this date no criminal charge of contempt has been filed against him. While this is true, the reason such charges have not been filed is that Kovacs had obtained from the Bankruptcy Court a decision that the automatic statutory stay applied against Ohio and then a decision that Kovacs' obligations under the state court judgment entry were dischargeable. Ohio vigorously disagrees with those decisions. Unlike Kovacs, however, Ohio does not disregard judicial decisions merely because it does not like them. Rather, Ohio complies with those decisions until it can obtain reversal of those decisions. Thus, while those decisions are in effect, Ohio has not initiated contempt charges. Ohio's respect for the decisions below until they are reversed cannot be relied upon by Kovacs as a matter in his favor.

In conclusion, Kovacs' repeated attempts to transform the true factual and legal context of this case do not work. The plain and simple fact remains that there is no support in the language of the Bankruptcy Code itself, its legislative history, or any other bankruptcy precedent for the sweeping effect of the decision below. Thus, in light of the complete absence of any basis in law for the decision below, the decision should be reversed.

III. BECAUSE THERE STILL EXISTS BETWEEN OHIO AND KOVACS A LIVE DISPUTE CONCERNING THE EXTENT OF KOVACS' CONTINUING OBLIGATIONS ESTABLISHED BY THE STIPULATION AND JUDGMENT ENTRY OF THE BUTLER COUNTY COURT OF COMMON PLEAS, THIS CASE IS NOT MOOT.

This Court has recognized that a case presents a live controversy where the dispute between the parties is:

> [D]efinite and concrete, touching the relations of parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law will be upon a hypothetical state of facts.

Aetna Life Insurance Company v. Haworth, 300 U.S. 227, 240-241 (1937); *North Carolina v. Rice*, 404 U.S. 244, 246 (1971). Furthermore, this Court has specifically recognized that a case is not moot where "'[a] controversy may remain to be settled.'" *United States v. W.T. Grant Company*, 345 U.S. 629, 632 (1953). As the briefs of Petitioner and Respondent clearly indicate, there still exists between Ohio and Kovacs a dispute concerning the extent of his continuing obligations under the Stipulation and Judgment Entry of the Butler County Court of Common Pleas. Specifically, the briefs of the parties establish three areas of dispute between Ohio and Kovacs concerning the extent of his continuing obligations under the state court injunctions.

The first area of dispute concerns Order No. Three (3) of the Stipulation and Judgment Entry which reads in relevant part as follows:

> Within 12 months of the signing of this order the defendants and their employees and agents are to remove and dispose of all industrial wastes and/or other wastes as described in finding No. seven (7) *from the premises at 500 Ford Boulevard.* (emphasis supplied). (A-46)

As indicated in the affidavit of Ohio EPA site coordinator David Strayer (Appendix M, JA-33), Kovacs did not remove "from" the Chem-Dyne site many of the wastes which the Common Pleas Court ordered him to remove. Rather, he dumped those wastes on the ground where they sank into the soil at the Chem-Dyne site and still remain. Thus, the State believes that Kovacs has failed to comply with Order No. 3 requiring him to remove all the wastes "from" the Chem-Dyne site. In contrast, Kovacs argues that he had no duty under the state court injunction to remove hazardous materials which now permeate the soil of the site. Kovacs contends that the only performance required by the injunctions is the elimination of waste from the surface of the site and accomplishing that elimination by pouring the materials on the ground constitutes "removal." (Respondent's Brief, p. 18-19). Ohio is confident, however, that if the question was presented to the state court, the court would find that the materials which Kovacs dumped on the ground have not been removed "from" the Chem-Dyne site as required by the Stipulation and Judgment Entry and that Kovacs remains obligated under the state court injunction to remove "from" the site hazardous materials which now remain on the Chem-Dyne site in the soil.

The second aspect of the continuing dispute between Ohio and Kovacs concerns Order No. One (1) of the Stipulation and Judgment Entry which reads as follows:

> The Defendants and their employees and agents are permanently enjoined and restrained from causing "pollution", as that term is defined in Section 6111.01(A) of the Revised Code, of "waters of the state" as that term is defined in Section 6111.01(H) of the Revised Code. (A-46)

Rather than complying with this injunction, however, as indicated in the Strayer affidavit (Appendix M, JA-33), Kovacs dumped waste materials into the sandy soil of the Chem-Dyne site so as to cause water pollution which is continuing until the present time. While Kovacs questions the relevance of this flagrant dumping (Respondent's Brief, page 18), he does so by completely disregarding Order No. 1 of the Stipulation and Judgment Entry. Once more, the State believes that if it could present the question to the Common Pleas Court, there is a strong likelihood that the Common Pleas Court would find that Kovacs' handling of the waste material in a manner which creates a continuing water pollution source constitutes a violation of Order No. 1 which violation must be abated by Kovacs.

The third area of dispute which still exists between Ohio and Kovacs concerns whether Kovacs may be punished for contempt of court as a result of his failure to implement the July 18, 1979 Stipulation and Judgment entry and as a result of his failure to comply with the injunction contained in the February 2, 1980 Order Appointing Receiver (JA-15) that he "cooperate fully

with the receiver" in the implementation of the Chem-Dyne site cleanup. (See, Brief of Petitioner, p. 26; Reply Brief of Petitioner, *infra*, p. 8-9). Kovacs argues that the appointment of the receiver effectively terminated his obligation to abate the hazard at the Chem-Dyne site and that he is not violating his duty to cooperate with the receiver. (Respondent's Brief, p. 14 - 16, 19). Once more, Ohio believes that it would prevail before the state court on this issue.

As a result of these three areas of dispute, it is clear that there is still a live controversy between Ohio and Kovacs as to whether or not the obligations imposed upon him by the state court have been fulfilled. The appropriate forum for the determination of the extent of Kovacs' obligations pursuant to the state court order is, obviously, the state court. Ohio's ability to return to the state court, however, is entirely dependent on the outcome of the case before this Court.

The determination of questions of bankruptcy dischargeability are placed within the exclusive jurisdiction of the federal courts. See 28 U.S.C. Section 1334. The decisions below hold that Kovacs' obligations pursuant to the state court Stipulation and Judgment Entry are dischargeable in bankruptcy. That determination of dischargeability cannot be reviewed or relitigated in the state court. Indeed, that determination, when combined with the provisions of the automatic statutory stay, 11 U.S.C. Section 362(b), particularly as previously interpreted below, effectively precludes the State from placing before the Common Pleas Court the merits of its dispute with Kovacs concerning his continuing obligations under the state court Stipulation and Judgment Entry. If, however, this Court were to reverse the decision below

and hold that Kovacs' duty to comply with the Common Pleas Court's injunctions is not dischargeable in bankruptcy, then Ohio would be able to initiate appropriate proceedings in the Common Pleas Court in order to determine the extent of Kovacs' continuing duties under the state court's injunctions. Thus, Ohio's ability to place before the Common Pleas Court its continuing dispute with Kovacs is entirely dependent upon a decision from this Court which would remove from Kovacs a "bankruptcy discharge" defense which he would certainly employ in any future state court proceeding. Therefore, whether or not there is any point for Ohio to return to the state court:

> [a]s a practical matter . . . is likely to depend almost entirely on the outcome of this litigation.

Sea Train Ship Building Corporation v. Shell Oil Company, 444 U.S. 572, 582 (1980). As a result, there is "specific relief through a decree of a conclusive character" which this court may grant to Ohio in this case: a decision that federal bankruptcy law does not provide a discharge of Kovacs' obligation to perform the actions required by the state court injunctions, actions which Ohio firmly believes have yet to be fully implemented.[3]

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[3]Kovacs' also argues (Respondent's Brief, p. 19) that the case is moot because the federal Superfund completed in December, 1983, the removal from the surface of the Chem-Dyne site of all waste which still remained in containers. As Ohio has indicated previously, however, due to Kovacs' past dumping practices, the parameters of the cleanup mandated by the state court injunctions extend beyond the removal of containerized wastes to soil and groundwater decontamination. These tasks, even Kovacs admits, have yet to be performed.

In addition to the fact that there still exists between Ohio and Kovacs a continuing dispute concerning the extent of Kovacs' obligations under the Stipulation and Judgment Entry, this case is not moot because of the doctrine repeatedly recognized by this Court that certain types of cases involve conduct which could be "capable of repetition, yet evading review." *Roe v. Wade*, 410 U.S. 113, 125 (1973). The factual context of the present case presents a perfect example of such a situation. In this case Kovacs created a public health hazard and then obtained from the Bankruptcy Court orders which precluded Ohio from compelling him to perform the actions necessary to abate that hazard. It has taken Ohio four years to bring before this Court for review the lawfulness of the Bankruptcy Court's interference with Ohio's environmental enforcement process. Because of the severe threat to public safety presented by the thousands of drums of flammable, toxic and, in some instances, explosive chemicals which remained on the surface of the Chem-Dyne site, obviously Ohio could not just let those materials sit there until the case reached this Court. Thus, since the government cannot allow a public health hazard to continue for several years while it seeks review of erroneous bankruptcy court decisions, the lawfulness of decisions of bankruptcy courts which prevent government from requiring the abatement of a health hazard could not be reviewed by this Court because the abatement of the hazard would "moot" the case.

Indeed, the facts of the case at bar clearly demonstrate the potential for repetition of Kovacs' unlawful acts. Under Ohio receivership law, the receiver is only entitled to equitable possession of the Chem-Dyne site while legal title remains in Kovacs. See, 46 Ohio Juris-

prudence 2d, *Receivers*, Section 43 (1961), p. 691. Thus, after the site has been restored and the receivership is terminated, possession of the Chem-Dyne site would revert to Kovacs. Then, Kovacs can again operate a hazardous waste facility on that site. If, after a period of six years, he creates another hazard on the site, he can once more seek the protection of the bankruptcy court. Then, if Ohio abates the hazard on its own, review of that bankruptcy court decision would again be precluded as "moot". Therefore, since the circumstances of this case present an example of a situation where conduct capable of repetition may avoid review, this case should not be held to be moot.

In summation, there exists a live dispute between Ohio and Kovacs as to the extent of Kovacs' present and future obligations under the Stipulation and Judgment Entry. Furthermore, this case involves conduct capable of repetition but which may evade review. As a result, Kovacs' mootness argument should be rejected.

CONCLUSION

For the reasons expressed in the briefs of Petitioner State of Ohio, the decision below should be reversed and this Court should determine that Kovacs' obligation to perform the environmental abatement mandated in the Stipulation and Judgment Entry is not dischargeable in bankruptcy.

Respectfully submitted,

ANTHONY J. CELEBREZZE, JR.
Attorney General of Ohio

E. DENNIS MUCHNICKI
Assistant Attorney General
Counsel of Record

State Office Tower
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
(614) 466-2766

ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

I certify that three copies of this Reply Brief of Petitioner State of Ohio, were mailed pursuant to Supreme Court Rule 28.3 by United States mail, first-class postage prepaid, this _____ day of October, 1984, to: David A. Caldwell, 900 Tri-State Building, Cincinnati, Ohio 45202; Kathryn A. Oberly, Assistant to the Solicitor General, Department of Justice, Washington, D.C. 20530; Lawrence R. Velvel, Chief Counsel, State and Local Legal Center, 444 N. Capitol Street, N.W., Suite 349, Washington, D.C. 20001; and Howard J. Wein, Assistant Counsel, Highland Building, 121 South Highland Avenue, Pittsburgh, Pennsylvania 15229.

E. DENNIS MUCHNICKI
Assistant Attorney General
Counsel of Record